

# *Nova Law Review*

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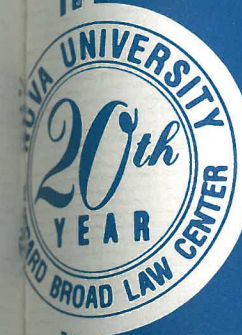
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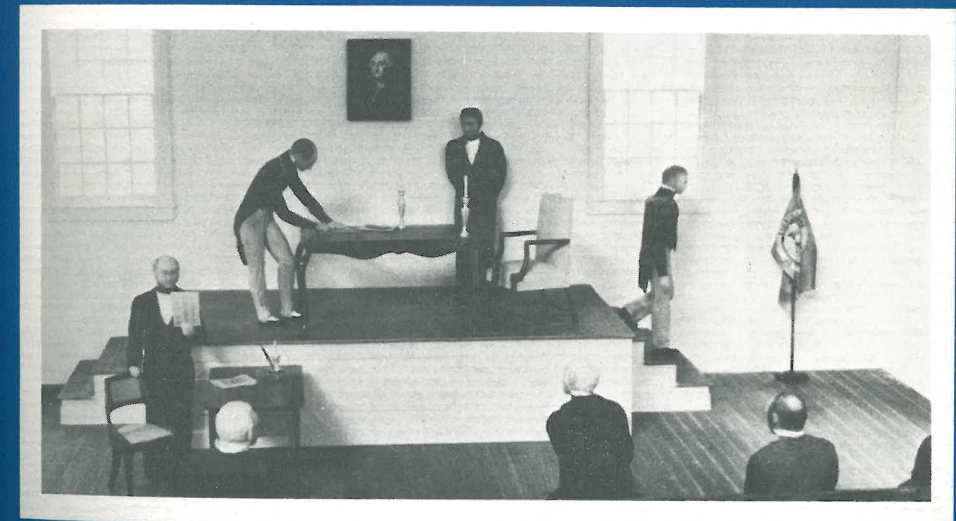
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# NOVA LAW REVIEW



Twenty-Five Years and Counting:  
A Symposium on The Florida  
Constitution of 1968



VOLUME 18

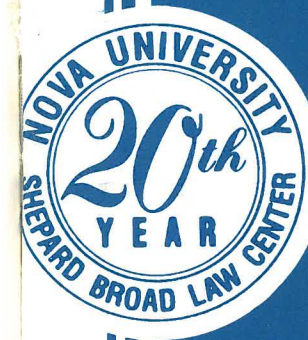
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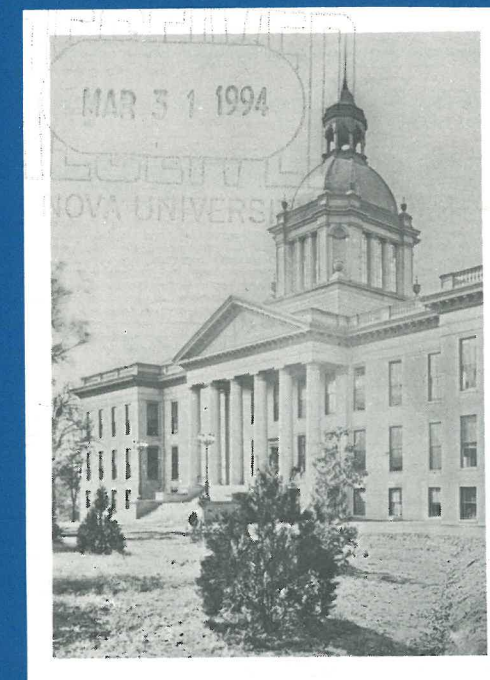
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# NOVA LAW REVIEW



Twenty-Five Years and Counting:  
A Symposium on The Florida  
Constitution of 1968



VOLUME 18

Winter 1994

NUMBER 2B

## TWENTY-FIVE YEARS AND COUNTING: A SYMPOSIUM ON THE FLORIDA CONSTITUTION OF 1968

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## Introduction: The Stories of State Constitutional Law

Robert F. Williams\*

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Federal and state bills of rights thus serve distinct but complementary purposes. The Federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. . . .

When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.

Chief Justice Leander J. Shaw, Jr.  
Supreme Court of Florida<sup>1</sup>

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\* Professor of Law, Rutgers University School of Law, Camden. B.A., 1967, Florida State University; J.D., 1969, University of Florida College of Law; LL.M., 1971, New York University School of Law; LL.M., 1980, Columbia University School of Law. The author served as a legislative aide during the drafting of the Florida Constitution of 1968 and represented clients before the 1978 Florida Constitution Revision Commission. He teaches State Constitutional Law at Rutgers, and is the author of *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (2d. ed. 1993) published by the Michie Company, and *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* (1990) published by Greenwood Press.

1. *Traylor v. State*, 596 So. 2d 957, 962-63 (Fla. 1992). I have referred elsewhere to Chief Justice Shaw's opinion in *Traylor* as "a primer on independent state constitutional analysis." Robert F. Williams, *Review Essay: A Generation of Change in Florida State Constitutional Law*, 5 ST. THOMAS L. REV. 133, 143 (1992).

For an exhaustive treatment of Florida state constitutional rights cases, see David C. Hawkins, *Florida Constitutional Law: 1991 Survey of the State Bill of Rights*, 16 NOVA L. REV. 167 (1991); David C. Hawkins, *Florida Constitutional Law: 1990 Survey of State Bill of Rights*, 15 NOVA L. REV. 1049 (1991); David C. Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693 (1990). For a broader view, see Stanley H. Friedelbaum, *Judicial Federalism: Current Trends and Long Term Prospects*, 19 FLA. ST. U. L. REV. 1053 (1992).

For a detailed study of the evolution of the text of Florida's rights protections, see Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549 (1993) and see generally JOHN F. COOPER & THOMAS C. MARKS, JR., *FLORIDA CONSTITUTIONAL LAW: CASES AND MATERIALS* 381-508 (1992).

Given the willingness of the legislature to propose amendments, the availability of the initiative process to the citizenry, and the frequent review by appointed commissions, it is clear that this history of the Florida Constitution will continue to be written in virtually every election.

Sandy D'Alemberte<sup>2</sup>

These twin perspectives, the protection of individual rights under state constitutions described by Chief Justice Shaw, and the relative ease of amending state constitutions described by Sandy D'Alemberte, create a paradox for state constitutional law.<sup>3</sup> Harry Witte described this paradox using the example of Pennsylvania:

Two fundamental principles were set down in the 1776 Constitution; the inviolability of basic, individual rights and the inherent right of the people to control, reform or abolish their government as they saw fit. While each principle may be seen as critical to one or another ideal of democracy, together they placed in potential opposition the right of the majority to govern and the right of minorities to be free of certain reaches of government.<sup>4</sup>

This paradox is one of the stories of state constitutional law that makes it different from federal constitutional law. There are many other stories, both about state constitutional law generally, and specifically about Florida constitutional law.<sup>5</sup>

The Florida Supreme Court has become one of the leading examples of the "changing faces of Southern courts."<sup>6</sup> The article by Justice Gerald

2. TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 16 (1991).

3. See Harry L. Witte, *Rights, Revolution and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383 (1993).

4. *Id.* at 384.

5. For each provision in a state constitution, no matter how seemingly trivial, there is a story to be told. It may be a political story rather than a lofty, "constitutional" story. As Lawrence Friedman stated:

There was a point to every clause in these inflated constitutions. Each one reflected the wishes of some faction or interest group, which tried to make its policies permanent by freezing them into the charter. Constitutions, like treaties, preserved the terms of compromise between warring groups.

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 119 (2d ed. 1985).

6. Mark Curriden, *The Changing Faces of Southern Courts*, 79 A.B.A. J. 68 (June 1993).

Kogan and Robert Craig Waters presents an invaluable look into the court's inner working, as well as both its adjudicatory and nonadjudicatory powers, which are *constitutionally* assigned.<sup>7</sup>

The court has included, although she has recently been nominated to the federal court of appeals, Chief Justice Rosemary Barkett, whose opinions join the "voices of . . . prominent state supreme court justices, each the first woman on her court and each an important contributor to her court in the development of state constitutional law."<sup>8</sup> As Chief Justice Barkett has observed: "It is, of course, axiomatic that Florida can interpret its constitution independently of the federal courts."<sup>9</sup> She has certainly made a mark on Florida's state constitutional jurisprudence. Professor Daniel Gordon's article in this Symposium traces the Florida Court's recent approach to state constitutional rights cases,<sup>10</sup> which is part of a national debate about methodology in such cases.<sup>11</sup>

7. Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151 (1994); see also John E. Fennelly, *ELM Street Revisited: The Florida Supreme Court's Rulemaking Authority and the Circuit Court's Subject Matter Jurisdiction Under the Local Government Comprehensive Planning Act—Real or Imagined*, 18 NOVA L. REV. 1289 (1994); Brian E. Mattis & B. Taylor Mattis, *Erie and Florida Law Conflict at the Crossroads: The Need for Statewide Stare Decisis*, 18 NOVA L. REV. 1333 (1994). See generally Joseph W. Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 STETSON L. REV. 1 (1989); John M. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 STETSON L. REV. 479 (1984).

8. Linda B. Matarese, *Other Voices: The Role of Justices Durham, Kaye, and Abrahamson in Shaping the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 239, 240-41 (1989).

9. *Traylor*, 596 So. 2d at 974 (Barkett, J., concurring in part and dissenting in part); see also *Gore v. State*, 599 So. 2d 978, 988 n.12 (Fla. 1992), *cert. denied*, 113 S. Ct. 610 (1992). In *Gore*, Chief Justice Barkett stated:

I use the terms "Fifth" and "Sixth" Amendment, as opposed to "article I, section 9" and "article I, section 16" for purposes of consistency with the majority opinion. I note that under the doctrine of primacy announced in *Traylor v. State*, 596 So. 2d 957, 962-963 (Fla. 1992), I would have first analyzed *Gore's* rights under the Florida Constitution before turning to federal constitutional law.

*Id.* (Barkett, J., concurring); see also *Perez v. State*, 620 So. 2d 1256, 1262-64 (Fla. 1993) (Barkett, C.J., dissenting); *State v. Hume*, 512 So. 2d 185, 189-90 (Fla. 1987) (Barkett, J., dissenting).

10. Daniel Gordon, *Good Intentions—Questionable Results: Florida Tries the Primacy Model*, 18 NOVA L. REV. 759 (1994); see also Harry Lee Anstead, *Florida's Constitution: A View from the Middle*, 18 NOVA L. REV. 1277 (1994); *Allred v. State*, 622 So. 2d 984, 986 (Fla. 1993).

11. See, e.g., Paul Bender & Earl M. Maltz, *Judicial Activism Under State Constitutions: Boon or Bane?*, 21 RUTGERS L.J. 1113 (1990); Earl M. Maltz, *The Dark Side of State Court*

Most of the current, fashionable stories about state constitutional law have to do with state judicial enforcement of rights protections found in the state constitutions. There are, however, a number of other important state constitutional law stories in Florida and the nation which do not involve adjudication of rights cases, nor do they involve adjudication *at all*. A striking example is the Florida Supreme Court's exercise, under the leadership of Chief Justice Arthur England, of its power to regulate the practice of law to create the Interest on Trust Accounts Program.<sup>12</sup> This has been, quite simply, one of the most spectacularly successful Brandeisian "state laboratory" experiments<sup>13</sup> of our time, now copied by all of the states but one.<sup>14</sup> Possibly the same will be true of the court's current innovations with respect to the *pro bono* obligations of lawyers.<sup>15</sup>

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*Activism*, 63 TEX. L. REV. 995 (1985); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMPLE L. REV. 1153 (1992); Robert F. Utter, *Swimming In the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

12. For the early history of this program, see generally *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re Interest on Trust Accounts*, 396 So. 2d 719 (Fla. 1981); *In re Interest on Trust Accounts*, 372 So. 2d 67 (Fla. 1979); *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978). The program is discussed in Randall C. Berg, Jr., *A Significant New Revenue Source for Legal Services Begins: Interest on Trust Accounts*, 15 CLEARINGHOUSE REV. 1015 (1982); Taylor S. Boone, Comment, *A Source of Revenue for the Improvement of Legal Services, Part II: A Recommendation for the Use of Client's Funds Held by Attorneys in Non-Interest Bearing Trust Accounts to Support Programs of the Texas Bar Ass'n and an Analysis of the Federal Income Tax Ramifications*, 11 ST. MARY'S L.J. 113 (1979); Taylor S. Boone, Comment, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Fla. Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539 (1979). The Internal Revenue Service approved the Program in Rev. Rul. 81-209, 1981-2 C.B. 16.

13. Justice Brandeis was, of course, referring to state legislatures when he made his famous observation: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Holmes referred to "social experiments . . . in the insulated chambers afforded by the several states . . ." *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

14. The only state to refuse to adopt the program is Indiana. See *In re Public Law No. 154-1990*, 561 N.E.2d 791 (Ind. 1990).

15. Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), 18 Fla. L. Weekly S348 (Fla. June 23, 1993); *In re Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Judicial Administration—2.065* (Legal Aid), 598 So. 2d 41 (Fla. 1992); *In re Amendments to Rules Regulating*



In Indiana, the one state still without an Interest on Trust Accounts Program, Chief Justice Randall T. Shepard recently stated:

Fifty state supreme courts have examined the questions about which my colleagues write today and forty-nine of them have reached the opposite conclusion. The fact that Indiana stands alone on this issue does not mean that we are wrong, but it certainly does not prove we are right. Instead, I think it suggests that this might be a moment to heed the advice we often give to juries: "Re-examine your views in light of the opinions of others."

Let there be no mistake: interest is being earned on "non-interest-bearing" Indiana lawyer trust accounts. This Court can choose to continue directing that interest to the financial institutions holding the accounts or it can choose to direct it to help people too poor to hire counsel or to underprivileged or minority students seeking a legal education.<sup>16</sup>

Recent years in Florida have seen the relative "rush" to *constitutionalize* a number of rights and powers. While most of these state constitutional developments are viewed as unqualifiedly "good," care must be taken by the Legislature,<sup>17</sup> the supporters of initiative petitions,<sup>18</sup> the Constitution Revision Commission,<sup>19</sup> constitutional conventions,<sup>20</sup> and the voters<sup>21</sup> to evaluate the relative merits and demerits of treating a topic in the state constitution. As Professor Frank P. Grad observed a generation ago:

This brings us to a consideration of the significance of treating a subject in the state constitution rather than leaving it to be dealt with by ordinary law. The significance is simply this: (1) it places the matter included in the constitution beyond change by normal lawmaking processes, and (2) it places it at the highest level of the legal authority of the state. . . .

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the Fla. Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), 573 So. 2d 800 (Fla. 1990). An important aspect of the regulation of law practice is *admission* to the Bar. See Thomas A. Pobjecky, *The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public*, 18 NOVA L. REV. 1313 (1994).

16. *In re Ind. State Bar Ass'n*, 550 N.E.2d 311, 316 (Ind. 1990) (Shepard, C.J., dissenting).

17. FLA. CONST. art. XI, § 1.

18. *Id.* § 3.

19. *Id.* § 2.

20. *Id.* § 4.

21. *Id.* § 5.

Without anticipating the detailed consideration of the matter, it must be recognized at the outset that the twin effects of constitutional treatment have consequences which, depending on the circumstances, may be considered beneficial or harmful. The enduring quality of a provision of the state constitution may protect a desirable policy from frivolous changes by the legislature, or it may delay or prevent the change to a new and better policy from one embedded in the constitution which is no longer responsive to current needs. . . . It ought to be added, too, that the beneficial consequences are usually intended, whereas the harmful ones are, more often than not, unintended and the result of changed circumstances.<sup>22</sup>

. . . .  
It is clear that the criteria proposed will require difficult judgments of degree, and the factors taken into consideration may be evenly balanced. But in view of the fact that all of the provisions in a state constitution operate as limitations on the legislature and on the government as a whole, and in view of the fact that the cost of including a proposal is likely to be high in the terms described, the burden of proof concerning the need for inclusion should be squarely on its proponent, and any doubts on the issue should be resolved *against* inclusion and in favor of the freedom of government to respond to emerging problems without constitutional limitations, express or implied.<sup>23</sup>

The constitutionalization of such matters as victims' rights,<sup>24</sup> bans on local mandates,<sup>25</sup> privacy,<sup>26</sup> and open government and records requirements<sup>27</sup> indicates the ability, noted by Sandy D'Alemberte above, of

22. Frank P. Grad, *The State Constitution: Its Function and Form For Our Time*, 54 VA. L. REV. 928, 946 (1968).

23. *Id.* at 972.

24. See FLA. CONST. art. I, § 16(b); Patrick B. Calcutt, Comment, *The Victims Rights Act of 1988, the Florida Constitution, and the New Struggle for Victims' Rights*, 16 FLA. ST. U. L. REV. 811 (1988).

25. See FLA. CONST. art. VII, § 18; Nancy Perkins Spyke, *Florida's Constitutional Mandate Restrictions*, 18 NOVA L. REV. 1403 (1994); Eric B. Smith & Kraig A. Conn, *Amendment 3: A Proposition to Limit Unfunded State Mandates*, FLA. B.J., Oct. 1990, at 72.

26. See John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow*, 18 NOVA L. REV. 775 (1994).

27. See FLA. CONST. art. I, § 24, art. III, § 4(c); Patricia A. Gleason & Joslyn Wilson, *The Florida Constitutional Open Meetings Amendments; Article I, Section 24 and Article III, Section 4(e), Florida Constitution, Let the Sunshine In*, 18 NOVA L. REV. 973 (1994).

Florida's reputation for state constitutional protection of open government is nationwide. See, e.g., *In re* 42 Pa. C.S. § 1703, 394 A.2d 444, 450 n.11 (Pa. 1978). The court stated:

Florida's citizens to change the "history of the Florida Constitution . . . in virtually every election."<sup>28</sup> By the same token, the comparably easy amendment to Florida's state constitutional search and seizure protection,<sup>29</sup> requiring "forced linkage" with interpretations of the Federal Fourth Amendment,<sup>30</sup> reflects the relatively unstable nature of such rights under an easily changeable constitution. This leads to the paradox described by Professor Witte above.<sup>31</sup> People in Florida must be careful not to "love the state constitution to death."

Still, as noted by Professor Grad, even the best state constitution will "occasionally require amendment and revision . . . to enable the constitution to develop in response to changing needs."<sup>32</sup> A good example of this

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It is of particular interest that Florida, the state which moved earliest and which is generally regarded as the most progressive in the area of expansive Open Meeting Laws, has itself excluded the judiciary from the scope of its act's coverage. And the Supreme Court of Florida has suggested that this exclusion is mandated by the separation of powers doctrine.

*Id.* at 450 n.11 (citations omitted).

28. See *supra* note 2 and accompanying text.

29. FLA. CONST. art I, § 12.

30. See generally *Perez v. State*, 620 So. 2d 1256 (Fla. 1993); John C. Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 275-79 (1989); Paul R. Joseph, *No Different Drummer: The Effect of the 1983 Amendment to Article I, § 12 of the Florida Constitution*, 5 ST. THOMAS L. REV. 101 (1992); Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

31. See *supra* notes 3-4 and accompanying text; see also John C. Van Gieson, *Gay Ballot is Focus of Court*, THE ORLANDO SENTINEL, Jan. 8, 1994, at D-1.

32. Grad, *supra* note 22, at 972. For an argument that the Florida Constitution is too easy to amend, see Joseph W. Little & Julius Medenblik, *Restricting Legislative Amendments to the Constitution*, FLA. B.J., Jan. 1986, at 43; see also Jim Smith, *So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions*, 18 NOVA L. REV. 1509 (1994).

Justice Parker Lee McDonald recently noted that the Florida Constitution "is one of the most easily amended constitutions in the country," primarily through the initiative. Advisory Opinion to the Attorney General—Limited Marine Net Fishing, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring).

The legal principles in the state constitution inherently command a higher status than any other legal rules in our society. By transcending time and changing political mores, the constitution is a document that provides stability in the law and society's consensus on general, fundamental values. . . .

The power to change both the constitution and statutory law is, theoretically, vested in the people. The power to amend the constitution is implicit in the declaration in article I, section 1, Florida Constitution, that "[a]ll political power is inherent in the people." The 1968 revision of the state constitution adopted the Revision Commission's recommendation to include a section explicitly

needed flexibility is Florida's recent budget amendment,<sup>33</sup> overruling a Florida Supreme Court separation of powers decision.<sup>34</sup> The budget amendment was proposed directly to the electorate from the appointed Tax and Budget Reform Commission.<sup>35</sup> Taking a longer view, state constitutional flexibility in Florida also has permitted the gradual, piecemeal adoption of many of the progressive recommendations of the 1978 Constitution Revision Commission, despite the defeat of all of its proposals in 1978.<sup>36</sup> The article in this Symposium by Thomas C. Marks, Jr. and Alfred A. Colby makes perceptive and well reasoned recommendations for state constitutional change in the future.<sup>37</sup>

Florida's recent term limit amendment,<sup>38</sup> part of a larger national state constitutional movement,<sup>39</sup> represents the most important fundamental

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dealing with the initiative process. . . . Recognizing the sovereignty of the people, I still feel compelled to express my view that the permanency and supremacy of state constitutional jurisprudence is jeopardized by the recent proliferation of constitutional amendments. . . .

. . . At this juncture, rather than espouse any particular solution as to how to prevent such abuse, I merely express my thought that some issues are better suited as legislatively enacted statutes than as constitutional amendments. It is my hope that the next Revision Commission will have the opportunity to establish some criteria regarding the subject matter of initiatives that will preserve the constitution as a document of fundamental laws, while still preserving the popular power of the people.

*Id.* at 1000 (footnotes omitted) (citations omitted). For a theoretical and philosophical discussion of the issue of amending a constitution's provisions for its own amendment, see PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* (1990).

33. FLA. CONST. art. III, § 19; *see also* Jon Mills, *Battle of the Budget: The Legislature and the Governor Fight for Control*, 18 NOVA L. REV. 1101 (1994).

34. *Chiles v. Children A,B,C,D,E & F*, 589 So. 2d 260 (Fla. 1991).

35. FLA. CONST. art. XI, § 6; *see also* Donna Blanton, Note, *The Taxation and Budget Reform Commission: Florida's Best Hope for the Future*, 18 FLA. ST. U. L. REV. 437 (1991).

36. D'ALEMBERTE, *supra* note 2, at 15; Steven J. Uhlfelder & Robert A. McNeely, *The 1978 Constitution Revision Commission: Ahead of Its Time*, 18 NOVA L. REV. 1489 (1994); Williams, *supra* note 1, at 139-40. *See generally* Symposium on the Proposed Revisions to the Florida Constitution, 6 FLA. ST. U. L. REV. 565 (1978).

37. Thomas C. Marks, Jr. & Alfred A. Colby, *Some Proposed Changes in the Florida Constitution*, 18 NOVA L. REV. 1519 (1994).

38. FLA. CONST. art. VI, § 4; *see also* P.C. Doherty, *A Quodlibet, A Mumpsimus, and the Rule of Infield Flies: The Unfinished Business of Term Limits in Florida*, 18 NOVA L. REV. 921 (1994).

39. *See* Doherty, *supra* note 38, at 921; *see also* Legislature of the State of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991), *cert. denied*, 112 S. Ct. 1292 (1992); LIMITING LEGISLATIVE

change in state legislative structure since the reapportionment mandated by the federal one-person-one-vote decisions. Florida's amendment, as well, applies to the Cabinet.<sup>40</sup> Actually, the term limit movement revives a fundamental feature of Revolutionary period state constitutions—rotation in office.<sup>41</sup> The problems with the modern version in Florida, described by Dr. Doherty,<sup>42</sup> sound like the type of “unintended consequences” about which Frank Grad warned.<sup>43</sup>

There are many stories about Florida constitutional law, going back over a century and a half. Some, in retrospect, are not so pleasant. For example, Eric Foner described the 1868 Reconstruction state constitutional processes in Florida:

Florida's convention, controlled after a series of complex maneuvers by a coalition of business-oriented white Republicans and Whiggish Conservatives, . . . skewed legislative representation in favor of white counties, gave the governor “imperial” powers of appointment, and authorized the legislature to establish an educational qualification for voting. Designed to attract white voters to a moderate Republican party devoted to Florida's economic development, the constitution, commented *The Nation*, “surpasses in conservatism that of any State in the Union.”<sup>44</sup>

More appealing is the story of Governor LeRoy Collins' apparently unsuccessful efforts to secure reapportionment through state constitutional

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TERMS, (Gerald Benjamin & Michael J. Malbin eds., 1992); Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477 (1992); Erik H. Corwin, *Recent Developments, Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569 (1991); Gary F. Moncrief et al., *For Whom the Bell Tolls: Term Limits and State Legislatures*, 17 LEGIS. STUD. Q. 37 (1992).

40. See Stephen T. Maher, *The Florida Cabinet: Is It Time for Remodeling?* 18 NOVA L. REV. 1123 (1994). Also on Florida's Cabinet, see Malcomb B. Johnson, *Why We Should Keep Florida's Elected Cabinet*, 6 FLA. ST. U. L. REV. 603 (1978); Joseph W. Landers, Jr., *The Myth of the Cabinet System: The Need to Restructure Florida's Executive Branch*, 19 FLA. ST. U. L. REV. 1089 (1992); Jon C. Moyle, *Why We Should Abolish Florida's Elected Cabinet*, 6 FLA. ST. U. L. REV. 591 (1978).

41. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 521-22 (1969).

42. Doherty, *supra* note 38, at 921.

43. See *supra* note 22, 23 and accompanying text.

44. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 323 (1988) (footnotes omitted) (citing Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South*, 51 FLA. HIST. Q. 5-7, 15-16 (July 1992)).



amendment in Florida. Sandy D'Alemberte and Frank Sanchez recount the story:

Years later, after Collins left the Governor's Office, he attended a dinner in Washington in which he sat next to Justice Hugo Black. Justice Black asked Governor Collins if he had experienced any serious failures as governor. Collins responded that his biggest failure was his inability to achieve fair legislative apportionment. Justice Black responded, "That was not a failure," and explained that Florida's inability to resolve the reapportionment issue had played an important role in the Court's deliberations in the Tennessee case and in the other cases that followed. The fight for fair apportionment that Collins started was finally won almost a year after he left office.<sup>45</sup>

Of course, it was reapportionment mandated by the United States Supreme Court that led to state constitutional modernization in Florida in 1968.<sup>46</sup> The 1968 state constitution was the result of what Justice E. Harris Drew called the "long and arduous work of the hundreds of men and women and many sessions of the Legislature in bringing about the Constitution of 1968 . . . ."<sup>47</sup> Still, however, the Florida Constitution retains the process of *legislative* reapportionment each decade, which as demonstrated by George Waas,<sup>48</sup> is fraught with problems.<sup>49</sup>

Florida is one of only a few states<sup>50</sup> to constitutionalize the right to collective bargaining.<sup>51</sup> Dean Roger I. Abrams' article reflects the application of this state constitutional provision, implemented by statute, in the context of public sector arbitration.<sup>52</sup> Richard Sicking's piece fills out

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45. Talbot "Sandy" D'Alemberte & Frank Sanchez, *A Tribute to a Great Man: LeRoy Collins*, 19 FLA. ST. U. L. REV. 255, 262 (1991) (footnotes omitted).

46. D'ALEMBERTE, *supra* note 2, at 12; Williams, *supra* note 1, at 135-36.

47. *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970).

48. George L. Waas, *The Process and Politics of Legislative Reapportionment and Redistricting Under the Florida Constitution*, 18 NOVA L. REV. 1001 (1994).

49. The 1978 Constitution Revision Commission proposed the establishment of a Reapportionment Commission to take the politically charged matter of legislative reapportionment out of the Legislature. See Elaine S. Williams, *A Summary and Background Analysis of the Proposed 1978 Constitutional Revisions*, 6 FLA. ST. U. L. REV. 1115, 1126-30 (1978).

50. Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 731-32 (1987).

51. FLA. CONST. art. I, § 6.

52. Roger I. Abrams, *Public Sector Collective Bargaining: An Arbitrator's View of the State Constitution*, 18 NOVA L. REV. 733 (1994); see also D'ALEMBERTE, *supra* note 2, at

the picture with respect to the funding of public employee pensions and the enforceability of negotiated pay raises.<sup>53</sup>

All of the articles in this Symposium tell stories of, and about, state constitutional law. State constitutional stories of the militia,<sup>54</sup> gambling,<sup>55</sup> the state flag,<sup>56</sup> homestead exemption,<sup>57</sup> and municipal home rule<sup>58</sup> are also told here. These stories are, almost exclusively, *legal* stories about *Florida* constitutional law. This is, of course, to be lauded and encouraged.<sup>59</sup> But, a fully developed study of state constitutional law should also be *interdisciplinary* and *comparative*, and include state constitutional history and theory.<sup>60</sup> As I continue to argue:

Many common themes appear in the constitutional law of all states. They share many of the same issues, despite differences in how such issues may be resolved in each state. . . . [Study should] focus on these common themes and issues, which are likely to arise in any jurisdiction.

24; Elaine S. Williams, *Alternatives to the Right to Strike for Public Employees: Do They Adequately Implement Florida's Constitutional Right to Collectively Bargain?*, 7 FLA. ST. U. L. REV. 475 (1979).

53. Richard A. Sicking, *Shoot the Patient or Find the Cure: The Florida Constitutional Requirement that Increases in Public Employee Pensions Be Funded on a Sound Actuarial Basis*, 18 NOVA L. REV. 1465 (1994).

54. Anthony J. Scaletta, Note, *The Governor's Troops Under the Florida Constitution*, 18 NOVA L. REV. 1133 (1994).

55. Eugene Bardakjy, Note, *Is There a Lucky Seven in Florida's Future?*, 18 NOVA L. REV. 1065 (1994). On gambling and state constitutions, see generally Robert Blakey, *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211 (1985); Grad, *supra* note 22, at 950 n.66, 955-56.

56. Robert M. Jarvis, *The History of Florida's State Flag*, 18 NOVA L. REV. 1037 (1994).

57. Donna Litman Seiden, *There's No Place Like Home(stead) in Florida—Should it Stay that Way?*, 18 NOVA L. REV. 801 (1994).

58. Ilene S. Lieberman & Harry Morrison, Jr., *WARNING: Municipal Home Rule is in Danger of Being Expressly Preempted by . . .*, 18 NOVA L. REV. 1437 (1994).

59. After all, as Professor Richard Kay has observed:

The transformation of a law school from an institution of vocational competence into one of intellectual excellence is often associated with an increased attention to legal subjects that are national in scope. . . . It is also true, however, that this broadening of interest need not be accompanied by an abandonment of a special concern for the legal issues and problems that are peculiar to a law school's home.

Richard S. Kay, *The Jurisprudence of the Connecticut Constitution*, 16 CONN. L. REV. 667, 667 (1984).

60. Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 TEMPLE L. REV. 1145, 1149 (1993).

This will, in turn, accent the importance of the unique language and judicial interpretation of the constitutions of the states in the resolution of specific issues.<sup>61</sup>

Attention to "horizontal federalism,"<sup>62</sup> or the treatment of issues in the constitutional texts or judicial interpretations of other states, is a central feature of state constitutional law. As Justice Hans A. Linde of Oregon noted: "Diversity is the price of a decentralized legal system, or its justification, and guidance on common issues may be found in the decisions of other state courts as well as in those of the United States Supreme Court."<sup>63</sup> It is in this sense that state constitutional law must be comparative.<sup>64</sup>

Many of the current topics of interest in Florida constitutional law are national in scope. I noted this with respect to the term limit movement,<sup>65</sup> but it is true as well in the areas of, for example, victims' rights,<sup>66</sup> limitations on state legislative mandates to local governments,<sup>67</sup> and English

61. ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 2 (2d ed. 1992); see also Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL ED. 243, 246-47 (1991); Robert F. Williams & Earl M. Maltz, *Introduction, Annual Issue on State Constitutional Law*, 20 RUTGERS L.J. 877, 878-79 (1989); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 172-73 (1983).

62. This is a term from MARY C. PORTER & G. ALAN TARR, *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* xxi-xxii (1982).

63. *State v. Kennedy*, 666 P.2d 1316, 1323 (Or. 1983). Former Justice Linde has cautioned, however, that state constitutions are not all alike and cannot be treated simply as "common law." See generally Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992).

64. In the words of New Jersey Supreme Court Justice Stewart G. Pollock, "[H]orizontal federalism, a federalism in which states look to each other for guidance, may be the hallmark of the rest of the century." Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985).

65. See *supra* note 39 and accompanying text.

66. See *supra* note 24 and accompanying text; see also Thomas B. Dixon, Comment, *Arizona Criminal Procedure After the Victims' Bill of Rights Amendment: Implications of a Victims' Absolute Right to Refuse a Defendant's Discovery Request*, 23 ARIZ. ST. L.J. 831 (1991); Don Siegelman & Courtney Tarver, *Victims' Rights in State Constitutions*, EMERGING ISSUES IN ST. CONST. L. 163 (1988).

67. See *supra* note 25 and accompanying text; see also WILLIAMS, *supra* note 60, at 789-92; Joseph F. Zimmerman, *The State Mandate Problem*, 19 STATE AND LOCAL GOV'T REV. 78 (Spring 1987).

language amendments.<sup>68</sup> Budget control, and legislative-executive clashes with the judiciary as arbiter, occur in many states.<sup>69</sup> State constitutional amendments, some of which require “forced linkage”<sup>70</sup> or lockstep with federal constitutional interpretation, are a national phenomenon.<sup>71</sup> Further, the process of state constitutional change, particularly through the initiative, is the topic of an important national debate.<sup>72</sup> Other aspects of the processes of state constitutional change, such as periodic revision, are also of national interest.<sup>73</sup>

Without both deeper and broader views of state constitutional law, encompassing constitutional theory<sup>74</sup> and history,<sup>75</sup> as well as comparing

68. See FLA. CONST. art. II, § 9; Donna M. Greenspan, Note, *Florida's Official English Amendment*, 18 NOVA L. REV. 891 (1994); see also D'ALEMBERTE, *supra* note 2, at 41; WILLIAMS, *supra* note 60, at 1003; Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

69. See *supra* notes 33-34; see also *Judy v. Schaefer*, 627 A.2d 1039 (Md. 1993); Louis Fisher, *The Effects of a Balanced Budget Amendment on Political Institutions*, 9 J. LAW & POL. 89 (1992).

70. See *supra* note 30 and accompanying text; see also BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 7, 37-38 (1991).

71. For literature on this phenomenon, see Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the “New Federalism,”* 8 U. PUGET SOUND L. REV. vi, x-xi (1985); James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1983); JoAnne Frankfurt & Amy Rodney, *California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause*, 10 GOLDEN GATE U. L. REV. 611 (1980); Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 169-79 (Winter 1987); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984); Witte, *supra* note 3.

72. See, e.g., Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment By Initiative Petition*, 17 OKLA. CITY U. L. REV. 3 (1992); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991); Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Hans A. Linde, *When Initiative Lawmaking is Not “Republican Government:” The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Witte, *supra* note 3.

73. See, e.g., Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473 (1987); Francis H. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563 (1982); Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People's Right to Reform Their Government*, 31 OHIO ST. L.J. 421 (1970).

74. As G. Alan Tarr described it:

[O]ne might have expected a lively dialogue between constitutional theorists and

state constitutional texts and judicial interpretations, the discourse about the topic will continue to be “impoverished and inadequate to the tasks that any constitutional discourse is designed to accomplish.”<sup>76</sup>

Academic commentators and state courts must begin to engage in what Professor Paul Kahn recently described as “a process of giving voice to the state court’s understanding of the values and principles of the national community.”<sup>77</sup> Kahn concluded that constitutional discourse, both state and federal, will be “enriched because fifty different courts will talk with each other, as well as with the federal courts, about the meaning of a *common enterprise*.”<sup>78</sup> Having due regard for textual differences, the judicial interpretation of state constitutions can be part of a “common enterprise.”<sup>79</sup> He elaborated this point as follows:

Just as his contemporaries looked to the case law from different jurisdictions to find the common principles of tort or contract, Cooley aimed to describe an American constitutionalism that was the common object of each state court’s interpretive effort. The diversity of state

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state constitutional scholars. However, no such dialogue has developed. Indeed, what is striking is how little attention scholars and jurists have paid to the relationship between constitutional theory and state constitutional law.

G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 842 (1991) (footnotes omitted); see also G. Alan Tarr, *Understanding State Constitutions*, 65 TEMPLE L. REV. 1169 (1992).

75. As Stephen E. Gottlieb stated:

Constitutional history is valuable whether or not one subscribes to a jurisprudence of original intent. For those who do, history becomes controlling — important because it does, or should, determine constitutional interpretation. For those who reject a jurisprudence of original intent, constitutional history nevertheless helps us to preserve the lessons embodied in the drafting of the provisions at issue and to explore the consequences of the language chosen. State constitutional history has become more important as the United States Supreme Court has become less protective of individual rights.

Stephen E. Gottlieb, *Foreword: Symposium on State Constitutional History: In Search of a Usable Past*, 53 ALB. L. REV. 255, 258 (1989); see generally TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

76. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992). Professor Gardner mounts a broad critique of state constitutional law itself. For responses, and Gardner’s defense, see *Roundtable on James Gardner’s Failed Discourse of State Constitutionalism*, 24 RUTGERS L.J. 907-1056 (1993).

77. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1168 (1993) (emphasis added).

78. *Id.* (emphasis added).

79. *Id.* at 1168.

courts, each claiming a unique authority, did not prevent their engagement in a common interpretive enterprise.<sup>80</sup>

Fortunately, there are a number of new materials available to aid in this broader, and deeper, common enterprise. Jennifer Friesen's *State Constitutional Law: Litigating Individual Rights, Claims and Defenses* was published by Matthew Bender in 1992.<sup>81</sup> This is the most important new treatise on state constitutional law since Cooley's *Constitutional Limitations*.<sup>82</sup> Barry Latzer's *State Constitutions and Criminal Justice*, providing a comprehensive national treatment of state constitutional criminal procedure decisions, was published in 1991 by Greenwood Press. *Rutgers Law Journal* publishes an Annual Issue on State Constitutional Law, now in its fifth year, which includes a comprehensive national survey of all state constitutional decisions. Various bibliographies have been published.<sup>83</sup>

State-specific studies such as this Symposium, when linked with other regional and national perspectives on state constitutions, and their interpretation, will contribute to the common enterprise of understanding the full reaches of American constitutionalism.

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80. *Id.* at 1163.

81. See Michael Libonati, *Book Review*, 66 TEMP. L. REV. 1329 (1993).

82. See Williams, *supra* note 60, at 1148.

83. See, e.g., CONSTITUTIONS OF THE STATES: A STATE BY STATE GUIDE AND BIBLIOGRAPHY TO CURRENT SCHOLARLY RESEARCH (Bernard D. Reams, Jr. & Stuart D. Yoak eds., 1988); TIM J. WATTS, STATE CONSTITUTIONAL LAW DEVELOPMENT: A BIBLIOGRAPHY (1992); Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980-1989*, 20 RUTGERS L.J. 1093 (1989).

## PART I

### INDIVIDUAL RIGHTS

*No aspect of the Florida Constitution has received greater judicial scrutiny, or more scholarly attention, than those provisions that create explicit individual rights, for it is in these sections of our Constitution that the difference between being a Floridian and being a New Yorker, or a Texan, or an Alaskan, is clearest.*

*Dean Roger I. Abrams begins this part of our Symposium with a provocative look at the constitutional right of public employees to bargain collectively. Professors Daniel Gordon and John Sanchez next examine, from two very different perspectives, the constitution's promise that the private lives of our citizens will remain free from governmental intrusion. Professor Donna Litman Seiden then presents an exhaustive summary of one of the most important rights enjoyed by Floridians: the protection of their homes from creditors. Finally, Nova Law Review staff member Donna M. Greenspan reviews one of the ugliest incidents in Florida's individual rights history: the attempt to ban the speaking of languages other than English.*



# Public Sector Collective Bargaining: A Labor Arbitrator's View of the Florida Constitution

Roger I. Abrams\*

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Legal scholars analyze judicial opinions from the top down. They start with the constitutional text. They examine how the courts—most likely the Supreme Court—twist and turn the words of that text to fit their notions of ordered liberty. They critique the products of this process in an effort to make the next run of cases purer.

Labor arbitrators start from the bottom and work up, finding a source of law in the practices of the shop floor, in the habits and customs of the trade, and, most importantly, in the terms of the collective bargaining agreements reached by labor and management.<sup>1</sup> Those agreements normally provide for arbitration of disputes that arise during their terms.<sup>2</sup>

In some instances, the worlds of the scholars and the arbitrators intersect. Grievance disputes in the public sector may involve issues of “external law,” i.e., statutory law and administrative regulations not embodied in the provisions of the collective bargaining agreements.<sup>3</sup> On very rare occasions, labor arbitrators must face—or as courts often do, try to avoid facing—constitutional issues.

The Florida Constitution contains a provision that protects the right of public employees to bargain collectively.<sup>4</sup> The Florida Legislature enacted

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\* Dean, Rutgers School of Law-Newark; Dean, Nova University School of Law (1986-1993); B.A., 1967, Cornell University; J.D., 1970, Harvard Law School. The author would like to express his appreciation to the men and women of the Nova law community for their support during his seven years as Dean of this fine institution.

1. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

2. In its survey of major collective bargaining agreements, the Bureau of National Affairs reported that 98% of its sample contained arbitration provisions. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 51:4 (1989).

3. Roger I. Abrams, *The Power Issue in Public Sector Grievance Arbitration*, 67 MINN. L. REV. 261 (1982).

4. FLA. CONST. art. I, § 6. Article 1, section 6 states as follows:

Right to work.—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

*Id.*

comprehensive legislation to regulate the operation of public sector labor relations.<sup>5</sup> These can be analyzed “from the top down,” but it might be more interesting to see how the legal and constitutional issues arise in the workplace.

In 1991, the City Commission of Lake Worth, Florida decided not to fund the third year wage and merit increases for its unionized workers set forth in their collective bargaining agreements. The four unions representing the workers filed grievances protesting the City’s actions. The parties arbitrated the disputes during the winter of 1992-93. Here is the last of the four arbitration opinions that were rendered.

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5. Ch. 74-100, §1, 1974 Fla. Laws 134 (codified at FLA. STAT. § 447.301 (1991)).

**AMERICAN ARBITRATION ASSOCIATION**

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In the Matter of an Arbitration \*

\*

- between - \*

\*

CITY OF LAKE WORTH \*

No. 32 300 00135 91

\*

Lieutenants - Failure to

- and - \*

Pay Increases

\*

PALM BEACH COUNTY POLICE \*

\*

BENEVOLENT ASSOCIATION

\*\*\*\*\*

**ARBITRATOR'S OPINION AND AWARD**

Alan Fallik  
For the City

Mary Jill Hanson  
For the Union

June 22, 1993

Roger I. Abrams  
Arbitrator

On October 28, 1991, the Palm Beach County Police Benevolent Association (Lieutenants) filed a class grievance regarding the City of Lake Worth's failure to pay wage increases in accordance with the Agreement. On November 4, 1991, the Chief of Police denied the grievance because Florida state law, section 447.309(2), "operates to make the collective bargaining agreement subject to the approval, through the medium of appropriations, of the City Commission." The Union processed the matter to the Acting City Manager, who denied the grievance. The Union has now brought the unresolved dispute to arbitration.

A hearing was held in Lake Worth, Florida, on April 29, 1993. During the course of the hearing, both parties presented the Arbitrator with oral testimony and documentary proof. A transcript was taken. Both parties filed briefs with the Arbitrator. The American Arbitration Association declared the hearing closed upon direction of the Arbitrator on June 11, 1993.

## I. ISSUES

At the hearing, the parties stipulated to the following statement of the issues to be resolved:

Did the City violate the Agreement when it failed to pay wage increases due under Article 27 for fiscal year 91-92? If so, what shall the remedy be?

## II. PROVISIONS OF THE AGREEMENT AND STATE LAW

### ARTICLE 1: PREAMBLE

Section 2. The purpose of this Agreement is to promote and maintain harmonious and cooperative relationships between the employer and employees, both individually and collectively, and to provide an orderly and peaceful means for resolving differences which arise concerning the interpretation or application of this agreement, and to set forth herein the agreement between the parties pertaining to wages, hours and terms and conditions of employment.

#### ARTICLE 4: MANAGEMENT RIGHTS

Section 3. If in the sole discretion of the Mayor or the Mayor's designee, it is determined that civil emergency conditions exist, including but not limited to riots, civil disorders, hurricane conditions, similar catastrophes, or exigencies, the provisions of this agreement may be suspended by the Mayor or the Mayor's designee during the time of the declared emergency, provided that rates and monetary fringe benefits shall not be suspended.

#### ARTICLE 27: PAY PLAN

Section 1. This Article establishes the wage rates to be paid to unit employees during the term of the Agreement. . . .

Section 2. Effective October 1, 1991, all Lieutenants will receive an increase of five percent (5%) over hourly rates in effect on September 30, 1991.

Section 3. Effective October 1, 1991, any Lieutenant whose performance evaluation justifies it will receive a three percent (3%) merit increase.

#### ARTICLE 31: GRIEVANCE PROCEDURE

In a mutual effort to provide harmonious relations between the parties of this Agreement, it is agreed and understood by both parties that there shall be a procedure in this Department for the resolution of grievances or misunderstandings between the parties arising from the application or interpretation of this Agreement. . . .

#### ARBITRATION REFERRAL

3. The arbitrator shall not have the power to add to, subtract from, modify, or alter the terms of the collective bargaining agreement in arriving at a decision on the issue or issues presented and shall confine his decision solely to the interpretation and application of the agreement.

4. The decision of the arbitrator shall be final and binding upon the aggrieved employee and the employer.



### ARTICLE 32: SEVERABILITY CLAUSE

Section 1. If any article or section of this agreement should be found invalid, unlawful, or not enforceable, by reason of any existing or subsequently enacted Federal or State legislation or by judicial authority, all other articles and sections of this Agreement shall remain in full force and effect for the duration of this Agreement.

Section 2. In the event of the invalidation of any article or section, both the City and the PBA shall reconvene within sixty (60) days of such determination for the purpose of arriving at a mutually satisfactory replacement for such article or section.

### ARTICLE 33: SAVINGS CLAUSE

This Agreement constitutes the entire agreement between the PBA and the City. . . . This Agreement will not be interpreted so as to deprive any employee of any benefits or protections granted by the laws of the State of Florida, ordinances of the City of Lake Worth, or personnel rules and regulations of the Lake Worth Civil Service Board.

## FLORIDA STATE STATUTE

### PUBLIC EMPLOYEES

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447.309 Collective bargaining; approval or rejection.

(1) After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit. The chief executive officer or his representative and the bargaining agent or its representative shall meet at reasonable times and bargain in good faith. In conducting negotiations with the bargaining agent, the chief executive officer or his representative shall consult with, and attempt to represent the views of, the legislative body of the public

employer. Any collective bargaining agreement reached by the negotiators shall be reduced to writing, and such agreement shall be signed by the chief executive officer and the bargaining agent. Any agreement signed by the chief executive officer and the bargaining agent shall not be binding on the public employer until such agreement has been ratified by the public employer and by public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3). However, with respect to statewide bargaining units, any agreement signed by the Governor and the bargaining agent for such a unit shall not be binding until approved by the public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3).

(2) Upon execution of the collective bargaining agreement, the chief executive shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

### III. BACKGROUND FACTS

The Police Benevolent Association of Palm Beach County represents a bargaining unit of six Lieutenants who work for the Police Department of the City of Lake Worth.<sup>1</sup> In 1989, the parties agreed to a three-year collective bargaining agreement, providing for a five (5%) percent across-the-board annual increase and a three (3%) percent merit increase. The Union had wanted a one-year contract, but the City insisted on a multi-year agreement to achieve labor stability. The City Manager recommended City

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<sup>1</sup> Lieutenant Jack Elliott Garson, the Union's representative to the Palm Beach County P.B.A., explained that the bargaining unit was established in 1988 after City Manager John Kelly told the Lieutenants that he "did not negotiate pay with his employees," unless they joined a union. The Lieutenants proceeded to do just that, form the small union that is party to the present arbitration.

Commission approval of the three-year contract for the Union police officers in order to set "the necessary labor perimeters." The City Manager explained that the three-year contract achieved the goal of "stabilizing the floundering" labor relationship.

During the spring of 1991, the Union learned that the City was preparing not to fund the third year of the negotiated wage increase for Union members and for the other unionized City employees. City Manager John Kelly sought to reopen the collective bargaining agreement with the Lieutenants. Garson refused to do so. He and other union leaders later met with Kelly. When Kelly said he would not recommend to the City that they fund the pay raises, Garson said it was "kind of a shock to me."

The entire negotiated third year pay increase for the Lieutenants bargaining unit totalled \$21,000. Kelly said the choice was to renegotiate or lay off employees, because the City had just purchased new police cars. (Garson pointed out in his testimony that the wage increase for the Lieutenants equaled the cost of just one of those cars). Garson wrote to Kelly explaining why the Union would not reopen the Agreement. City Manager Kelly responded that not giving the raises "is not a matter of money." He needed to "have a tool to have the other unions give up their pay raises."

Lieutenant Robert Walton, who had negotiated the first contract between the Union and the City, testified concerning his dealings with the City during 1991. Kelly told Walton the State Legislature gave him the authority not to fund pay raises. Kelly offered options, such as reopening the Agreement, waiving the pay increase for six months, or just trusting that he would work things out. The Union was not receptive and felt intimidated. After consulting with attorneys and the PBA president, the Union rejected the option of reopening. At one afterwork meeting at the Police Department, Kelly told Walton: "If you guys leave the union, maybe we can work something out."<sup>2</sup>

Former City Commissioner Michael Coonerty testified that in May 1991 John Kelly notified the Commissioners of a budget problem. Kelly recommended that the Commission cut back some City services and that it not fund the contractual wage increases for unionized employees. Coonerty testified: "We knew we were in trouble." None of the Commissioners suggested not funding the contractual wage increases. It was the City Manager's idea. In an executive session, Kelly said: "There is a state law

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<sup>2</sup> Although the lieutenants did not abandon their Union, soon the City abandoned John Kelly. He was fired in September 1991.

that specifically states that we do not have to fund a contract if there is not enough funds." The Commission acted based on Kelly's advice.

On cross-examination, Coonerty said he voted not to fund the increases "in the best interest of the City." He acknowledged he did consider the effect on collective bargaining: "I'm a politician after all!" He said this was the hardest decision he ever had to make, and "I knew it was going to hurt." He said that they had to look at the broader picture. They thought the choice was either to fund the contracts or lay off employees. He knew that the unions would never trust the City again and the union-management relationship would never be the same. He acknowledged that the City Commission could have raised taxes, but he felt that that was not in the best interest of the citizens of the City. If taxes went up, he said, it "can hurt my political career."<sup>3</sup>

The record includes the prior testimony and reports of Union expert, Dr. Marshall Barry.<sup>4</sup> In sum, that information demonstrates that the City had available other funding sources for the contractual wage increases.<sup>5</sup> The record also contains minutes of various City Commission meetings. After the Commission's action contested here, the City spent funds for various purposes, including a ten percent (10%) salary increase to the Acting City Manager. When the City Commission terminated City Manager John Kelly, Walton expressed his disgust when he heard the Commissioners decide to pay Kelly the severance pay required under his contract. One Commissioner said: "After all, a contract is a contract." Walton could not understand why that did not apply to the Union's contract.

Charles Z. Powers, the City's Finance Director, testified concerning the budget process which led to the decision by the City Commission not to fund the Contract increases. The Finance Department prepared work sheet forms and the budget manual, then submitted proposed budgets to the City Manager. A series of meetings were then held between the departments, the City Manager, and the Finance Department. Finally, a tentative millage was set by the end of July, workshops were held through August, public hearings were held in September, and, after a final hearing, the City Commission set

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<sup>3</sup> Mr. Coonerty is no longer on the Lake Worth City Commission.

<sup>4</sup> This is the fourth arbitration to raise that same issue. Prior cases involved firefighters represented by the I.A.F.F., rank and file police represented by the P.B.A., and utility workers represented by the I.B.E.W.

<sup>5</sup> It is the City's position, as shall be explained below, that the City Commission had the power simply to decide not to fund the third year of the contracts even if it had alternative funding sources.

the millage and adopted the budget. The submitted budget included the proposed increase based on the Union Agreement which was then deleted by City Commission vote.

Powers explained that as early as December 1990 or January 1991 before the budget process began, the City Manager received advice from City Attorney Alan Fallik that one option available to the City was not to fund the Union Contract increases under state law. Mr. Power testified that the City Manager was required to propose a budget that included the Contract increases, but Kelly did not want his proposal accepted. The City Manager explained to the Commission: "I had to fund those things. You don't." The City Commission did not.

#### IV. CONTENTIONS OF THE PARTIES

##### A. The Union's Argument

The City should be collaterally estopped from relitigating this issue because two prior arbitration awards involving the City have covered this precise matter. In any case, the City clearly breached the Agreement by failing to pay the contractually agreed upon wage increase, and the Arbitrator's inquiry should stop there. The Arbitrator should follow the established arbitral practice and not examine external law.

Moreover, the contract itself shows that external law does not apply. It provides that the contract is the "entire agreement," that the adoption of the Agreement "resolves all open issues for the period of the Agreement," and that Management retains only such rights as are "not officially abridged, delegated, or modified by this Agreement." The Arbitrator "should not start up the slippery slope of consideration of the interpretation and applicability of section 447.309(2)." (Union brief, p. 12).

Even applying the state statute does not help the City because the City did not comply with the provision. In the very least, the City Manager must make his initial budget submission in good faith. That clearly was not the case here. Moreover, the statute talks only of unfair labor practice liability, not contractual obligations. In any case, this was a multi-year contract that the Commission had ratified and agreed to fund. If the statute did apply, it would impair a contract in violation of both the State and Federal Constitutions. The statute, as read by the City, would also violate a Florida Constitution provision by abridging the right of public employees to bargain collectively.

"Clearly, what occurred here was the worst sort of political expediency." (Union brief, p. 24) There was no compelling governmental interest. The City did not employ the least restrictive means to accomplish its goal. The City disturbed "the delicate balance" that is the public policy in Florida. Therefore, the grievance must be granted. The Arbitrator should award back pay with interest.

## B. The City's Argument

The City relies totally on Florida law which it argues supports its failure to pay the wage increase. Section 447.309(2) gives the City the "option of underfunding" the agreement. Court decisions plainly support this analysis, including the most recent supreme court decisions and a Second District Court of Appeal decision in Sarasota County School District. In that latter case, the District Court said that "[u]nfortunately" for public employees, the school board had the right not to fund the contract. As a practical matter, unfair labor practice case law must apply in grievance arbitrations or the state statute would be rendered a nullity.

The constitutional right to bargain must be balanced with the constitutional obligation of municipal bodies to act as guardians of the public funds. The City Commission here acted in two separate steps -- ratification and appropriation. Although it ratified the three-year agreement, it had the right not to appropriate the funds. "In summary, there is no logical basis and no legal authority to support an argument that the powers of a municipal legislative body regarding appropriations are more limited than those of the state legislature, even though the municipal legislative body is the same body that ratified the agreement." (City brief, p. 11). The supreme court's most recent decision does not require a contrary result. There was no impairment of contract here because state laws are a part of every Florida contract.

The Arbitrator must apply external law, as is the rule. The parties' Agreement points to the use of external law. In any case, the parties need not agree in writing to incorporate external law because they know that the law is automatically a part of every contract. The Contract allows an arbitrator to find a provision invalid using external law. "To the extent the City Commission underfunded Article 27, Pay Plan, that article became invalid" under the law. (City brief, pp. 18-19).

The three prior arbitration awards involving the City and one involving a nearby municipality were wrong. They ignored the fact that law is part of every contract. It is "most unfortunate that arbitrators see fit to deprive

public employers of fundamental rights of government and to grant public employees the unconditional right to receive funding in direct violation of law." (City brief, p. 22). This Arbitrator wrongly stated in his earlier decision that the City claims it had the right only to breach union contracts but must fulfill all other contracts with vendors. In fact, the City has the right not to fulfill any contract it wants. This Arbitrator questioned the good faith of City Manager Kelly. The statute does not require the City Manager to have acted in good faith. For all these reasons, the Arbitrator should deny the grievance.

## V. DISCUSSION AND OPINION

### A. Introduction

The City Commission of the City of Lake Worth, Florida, made a decision during 1991 not to appropriate the funds needed to meet its contract obligations with its unions, including the small P.B.A. Lieutenants Union. The increases were mandated under the respective binding and enforceable collective bargaining agreements. Three arbitrators, including the undersigned, have previously ruled on grievances protesting the City's action. This case completes the quartet. In the prior cases, the arbitrators ruled the City violated its contracts. As shall be explained below, the City's action here violated its Agreement as well.

In its brief, the Union argues that the Arbitrator must follow the earlier arbitration opinions and that the City is "collaterally estopped" from rearguing the issues. Arbitrators Brown, Hoffman and this Arbitrator have resolved disputes between the same employer and different unions.<sup>6</sup> Those opinions are of great assistance in resolving this dispute, but they are not controlling unless the parties' Agreement makes them so.

The resolution of the merits of this dispute does parallel this Arbitrator's analysis in the I.B.E.W. case. Much of the reasoning and some of the language used in that opinion is usefully applied here. The City makes many of the same arguments. It makes no pretense about its contractual

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<sup>6</sup> Arbitrator Susan Brown's decision involving rank and file police officers was based on a collective bargaining agreement that contained many of the same provisions as this contract.

obligations. It again claims that under state law it was not required to live up to its Agreement.<sup>7</sup>

The Arbitrator wrote in the I.B.E.W. case that the City was claiming that it must fulfill every contract it has with every vendor, except one -- the contract with unionized employees who sell their labor to the City. Apparently, the Arbitrator was wrong. The City now retorts in its brief with one of the most breathtaking arguments ever made to this Arbitrator. The City claims that under the Florida Constitution it has the right not to honor any and all contracts it has executed simply by not appropriating the required funds, including, presumably, those contracts that have been partially performed, such as the present Agreement.<sup>8</sup> That would make doing business with a governmental entity a matter of roulette. Will it pay? Will it not? It depends on how its feels at the moment. That cannot possibly be the way the business of government is to be conducted in the State of Florida.<sup>9</sup> The Florida Constitution does not allow a municipality to create a "shell game" when dealing with its vendors.<sup>10</sup>

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<sup>7</sup> In the I.B.E.W. case, the Arbitrator termed that "a remarkable claim," and the City criticizes the use of the adjective in its current brief. It remains a "remarkable claim," however, to suggest that every contract promise with financial implications -- virtually every provision in the collective bargaining agreement -- is voidable at will by the public employer without the need to demonstrate a compelling reason.

<sup>8</sup> In fact, former City Commissioner Michael Coonerty who was on the Commission during 1991 stated that this was the only contract that the City had not fulfilled. The City lives up to its obligations, except when it comes to its unionized employees.

<sup>9</sup> If that were the case, every vendor would add a premium on to the cost of its product or service as insurance against non-payment by a government purchaser.

<sup>10</sup> Article VII, section 1(c) of the Florida Constitution, which provides that no money shall be drawn from the treasury except in pursuance of appropriation made by law, requires a municipality to conduct local government in a responsible manner. The money in the public treasury does not belong to the City Manager or the City Commissioners; it belongs to the City and the people of Lake Worth. It is to be used to provide the goods and services the people of Lake Worth need, including police, fire and utility services. The Florida Constitution does not allow a municipality to get something for free by not paying for what it buys. It does not allow a municipality to agree to purchase a commodity for a certain price and then



There are also some unique facts in this case that require a slightly different analysis and at least one new court decision that must be addressed. Here the uncontradicted evidence shows that the City Manager requested a reopening of the Agreement. He wanted to renegotiate the third year wage increase. The City Manager's request to renegotiate shows the City knew that the Contract must stand unless mutually amended. Otherwise, why would he bother to request further negotiations? If the City really believed it had the right under Florida law to ignore agreements with impunity, a reopening would not have been necessary.

### B. Analysis of External Law

The City says the Arbitrator must apply external law and the Union insists to the contrary. That disagreement threads through this series of disputes between the City and its unions. Each arbitrator has determined that external law does not apply. Everyone agrees that an arbitrator's job is to resolve grievances in accordance with the terms of the collective bargaining agreement.

The Agreement here provides: "The arbitrator shall not have the power to add to, subtract from, modify, or alter the terms of the collective bargaining agreement in arriving at a decision on the issue or issues presented and shall confine his decision solely to the interpretation and application of the agreement." (emphasis added). The direction to the arbitrator is clear: Look "solely" at the terms of the Agreement.

There really can be no question that the Agreement required the City to pay wage increases and merit increases during its third year. The City admits as much. For good reason or bad reason or for no reason at all, the City Commission decided not to live up to those promises. There was evidence in the record from the Union expert's testimony in other proceedings that the increases could have been funded through a variety of sources without affecting services at all. The City says that is all beside the point. It could decide it did not want to pay what it promised it would pay. The City does not claim that the external law allows it to nullify contract clauses

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pay less than the agreed price. Article VII, section 1(c) requires that the formalities of government be followed so that the business of government might proceed in an orderly manner. It is not an excuse for nonpayment or underpayment.

only for good reasons. Its argument is broader than that. The City says it can decide not to fulfill its financial obligations for any reason at any time.

The basis for the City's claim is Florida Statutes section 447.309(2), quoted above, which addresses collective bargaining in the public sector. As applied to a municipality such as the City of Lake Worth, section 447.309(2) would require the City Manager to request that the City Commission appropriate money to fund the provisions of the Agreement. (The evidence shows that the City Manager John Kelly did that, although he hoped the City Commission would not follow his request and worked to make sure it would not.) The statute then says "if less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the [City Manager] on the basis of the amounts appropriated by the legislative body." Did the Florida Legislature intend to allow municipalities, such as Lake Worth, to jettison their contract promises?

The City relies on three court decisions that apply the provision. In United Faculty of Florida v. Board of Regents, 365 So. 2d 1073 (Fla. 1st Dist. Ct. App. 1979), the First District Court of Appeal denied a union request for full funding of its contract with the Board when the State Legislature only partially funded it. In State v. P.B.A., 613 So. 2d 415 (Fla. 1992), the Florida Supreme Court ruled that public employees do not have the right to demand that the State Legislature appropriate funds under a collective bargaining agreement negotiated by the Governor. Most recently, in Sarasota County School Board v. Sarasota Classified Teachers Ass'n, 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993), the Second District Court of Appeals reversed a PERC decision, ruling that a school board did not commit an unfair labor practice when it failed to appropriate funds needed to cover step increases for teachers after the expiration of the collective bargaining agreement.<sup>11</sup>

In its brief, the City attempts to explain away the most recent Florida Supreme Court decision involving legislative underfunding of a collective bargaining agreement. In Chiles v. United Faculty of Florida, 615 So. 2d

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<sup>11</sup> It might be argued that two of these state cases arise under a very different bargaining relationship. In the First District Court of Appeal's United Faculty of Florida case and the Florida Supreme Court's P.B.A. case, the Board of Regents and the Governor had negotiated the contracts. The only opportunity the State Legislature had to approve or disapprove the agreements was through the appropriation process. Here, by comparison, the Lake Worth City Commission had ratified the Agreement, then two years later reneged on its promise.

671 (Fla. 1993), Justice Gerald Kogan addressed "a matter of great public importance." The State Legislature had resolved a bargaining impasse by authorizing a three (3%) percent raise for various classes of public employees. Because of a projected budget shortfall, it then postponed and finally eliminated the planned pay raises. The unions representing the affected employees sued based on the constitutional protection of the right to bargain collectively contained in the Florida Constitution. The court distinguished the P.B.A. case, decided less than three months earlier, based on the fact that here "an agreement was reached and funded, then unilaterally modified by the legislature, and finally unilaterally abrogated by the legislature." The court rejected the State's argument that public employee bargaining agreements cannot ever constitute fully binding contracts: "The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." In dictum, the court said that the Legislature does have the right "to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, but only where it can demonstrate a compelling state interest. . . . Before that authority can be exercised, however, the legislature must demonstrate that [there are] no other reasonable alternative means of preserving its contract with public workers, either in whole or in part." The court suggested that if the employer could void a promise at will "we necessarily would be required to conclude that there was no contract here at all for lack of mutuality. . . ." The court ordered the Legislature to implement the pay raise.

The City argues that in the Chiles case appropriations were actually made for the raises in question, then postponed, while here the City Commission refused to make the appropriations required in the third year of the Agreement. That ignores the fact that the City Commission here had ratified the three-year agreement as a whole. The City and the Union then performed under that three-year Agreement (not a series of one-year agreements) for two full years before the City reneged on its promise. The City actually received a substantial part of its bargain, the extended stability in labor relations that the City Manager used as the rationale for the three-year contract demand.

As the most recent word from the supreme court, Chiles stands generally for the proposition that promises made by a legislative body are enforceable. As applied here, that means that once the City Commission ratified the three-year Agreement and enjoyed the benefits of that Agreement, it was bound to fulfill its obligations. As the supreme court said in Chiles: "The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." The City cannot take advantage of that right

when it suits its purpose, and then vitiate that right without compelling reason when it decides it no longer wants to keep its word.

The recent Sarasota case relied upon by the City involved a school board, not a state instrumentality. It warrants closer attention. In that case, the collective bargaining agreement between the school board and the teachers union expired. The consistent prior practice had been for the school board to continue to pay step increases while new contracts were negotiated. This time, as a result of an extreme financial emergency,<sup>12</sup> the school board did not do so. PERC found this an unfair labor practice, but the Second District Court of Appeal reversed, holding that section 407.309-(2) applied after the expiration of an agreement.

The Sarasota case involved unfair labor practice liability, not liability under a contract. There, the legislative body had never promised to pay the step increases after the expiration of the agreement. By comparison, the City of Lake Worth's "legislative body" had promised pay increases.<sup>13</sup> There is language in Sarasota that suggests that public sector collective bargaining agreements are not as good as private sector contracts, and that public employees "unfortunately" are disfavored. This language sounds like the old, discredited cases that talked about public employment as a "privilege," revocable at will without due process, opinions that long preceded Florida's Constitutional amendment protecting public employee collective bargaining.

Collective bargaining in the public sector is certainly more complicated than its private sector counterpart. In many instances, public sector contracts are negotiated by the executive branch and later approved (or not approved) by the legislative branch. As co-equal branches, each should have its say. Once a contract is fully approved, as was the case here by the City Commission, the contract should be enforceable by its terms in arbitration.

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<sup>12</sup> We should remember that the City of Lake Worth does not claim a financial basis for its failure to pay the agreed raises.

<sup>13</sup> The Second D.C.A. states that the school board had promised payment during the term of the agreement, and it would have been required to fulfill its undertaking: "Since the agreements were fully funded during the three year period, barring any exceptional circumstances such as exigent circumstances or waiver, an unfair labor practice would have been committed if the school board had unilaterally discontinued step increases." 614 So. 2d at 1143.

The Union argues that the City cannot rely upon section 447.309(2) even if it did apply because it must be read to require the City Manager to submit an adequate budget in good faith. The Union argues that City Manager Kelly did not act in good faith and there is evidence in the record to support that claim. Unlike the record in the I.B.E.W. case, here we have the direct testimony of a former City Commissioner that City Manager Kelly in fact recommended that the Commission not fund the contractual wage increases. In executive session, Kelly said: "There is a state law that specifically states that we do not have to fund a contract if there is not enough funds." The Commission acted based on Kelly's advice.

There are no court decisions that speak directly to the issue of whether the City Manager must subjectively want and hope that the City Commission approves his proposed budget in order for a public entity to avoid unfair labor practice liability under section 407.309(2). Here the evidence points beyond subjective intent, however. The uncontradicted evidence shows that the City Manager worked actively to nullify the budget he had submitted. That may be significant under section 447.309(2) because it raises questions concerning whether the Employer fulfilled its obligation to bargain in good faith.

None of the opinions addressing on section 447.309(2) offer a definitive reading of the legislative intent, in particular with regard to contract liability as determined in arbitration. The last sentence in the section 447.309(2) paragraph does clarify the purpose of the provision, however. The statute says that the failure of the legislative body to appropriate sufficient funds "shall not constitute, or be evidence of, any unfair labor practice." The provision appears to have been designed to keep the State Public Relations Commission out of the business of second guessing the legislative judgments of local municipalities.<sup>14</sup> It does not

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<sup>14</sup> The unfair labor practice cases cited by the City demonstrate this legislative judgment at work. In Martin County Educ. Ass'n v. School Board, 18 FPER para. 23167 (PERC 1992), for example, the agency that administers the statute stated that the "legislative body [has] unfettered discretion to underfund a collective bargaining agreement." (at 290). This is the case, however, only with regard to disputes within PERC's jurisdiction, that is, unfair labor practice cases. PERC is not charged with the responsibility of interpreting the parties' Agreement. Its expansive dictum cannot bind an arbitrator who does have that responsibility. It is important to focus carefully on the jobs of the respective adjudicators.

free the City from its contract obligations that might be perfected in another forum, such as arbitration.

The City argues that section 447.309(2) cannot be limited to unfair labor practice cases because otherwise it would be a nullity. If an employer is still bound by its promises, the City says, what good is it to relieve it from ULP liability? The argument ignores issues of institutional competence, allocation of decisional power, and the intent of the negotiating parties. The Legislature might have wanted to keep PERC out of intra-governmental funding disputes. It might have thought that arbitrators were better able to resolve these types of disputes. It might have allowed the parties' intentions to control with regard to the appropriate forum for resolution. In any case, the Section talks about unfair labor practice liability. That was the Legislature's plain intention, even if it did not totally free municipalities from fulfilling their promises.

As the Arbitrator stated in the I.B.E.W. case, reading section 447.309-(2) as the City suggests would make collective bargaining a cruel joke. The heart of negotiations is the wage promise. The City pressed the Union for a three-year contract. The Union wanted a one-year deal, but finally agreed to the City's demand. The length of the contract is also a crucial element in bargaining. The two provisions -- wage increases and length of the contract -- are interrelated. A three-year contract may provide the labor stability management seeks, but it creates risks for a union. It is "betting" that inflation will not render the negotiated wage increase a mirage.<sup>15</sup> With a one-year agreement, the union can attempt to recalibrate the wage scale annually. When the Union here agreed to the City's demand for a three-year agreement, it had good reason to trust that the *quid pro quo* would follow, the payment of the negotiated wage increase over the three years.<sup>16</sup>

If one party to the Agreement can ignore its promises for any reason or no reason at all, was there ever any real collective bargaining? We must remember that public employees enjoy the protection of a Florida Constitu-

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<sup>15</sup> Of course, under any contract a union must contend with unforeseen emergency situations. Financial distress might well be an excusing circumstance, but the City claims nothing of the sort here.

<sup>16</sup> The City suggests that, in fact, because the City decides to fund contracts on an annual basis, that the three-year agreement is really a collection of three one-year contracts. (City brief, p. 27). If that is so, then why did it insist on a single three-year contract in its negotiations with the Union? Why then did it ratify a three-year agreement?

tional provision, article I, section 6; which expressly supports collective bargaining. Section 447.309(2) should not be read in a way that would render it subject to constitutional question. The Legislature should be presumed to have enacted a constitutional statute. There is no evidence in the record or in any available research that demonstrates that it was the State Legislature's intention to permit Constitutionally-protected collective bargaining to be destroyed by legislative bodies at the local level.<sup>17</sup>

### C. Applicability of External Law

Although the external law on its face and as interpreted by the courts does not excuse the City's action, in order to resolve this dispute the Arbitrator need not look to external law. Nothing in the parties' Agreement requires the contract arbitrator to read, interpret and apply enacted legislation. The City argues that all state laws are part of the Agreement. Where does it say that in the Agreement? The City points to Article 4 that protects management rights. If the decision to underfund is an inherent management right, then the City does not need external law. It would have this right by contract. Obviously, this is not an inherent management function. Otherwise, the wage promise would be a sham. That could not have been what the parties intended.

The City also argues that the Agreement "specifically recognizes the possibility that portions of the agreement may be found invalid by reason of State law." (City brief, p. 1) The reference is to Article 32, section 1, that provides:

If any article or section of this agreement should be found invalid, unlawful, or not enforceable, by reason of any existing or subsequently enacted Federal or State legislation or by judicial

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<sup>17</sup> The City's argument concerning the effect of section 447.309(2) is brought to the extreme towards the end of its brief when it argues that not only does this provision override the constitutional right of public employees to bargain collectively, but the City doubts that it could even waive the "right to underfund" if it wanted to. (City brief, p. 26). That means that the parties to a public sector labor relationship in Florida cannot reach a binding agreement. Even if the public employer expressly agrees not to nullify the terms of an agreement, it is incapable of keeping that promise. According to the City's argument, there can be no real public sector collective bargaining in Florida.

authority, all other articles and sections of this Agreement shall remain in full force and effect for the duration of this Agreement.

This typical savings clause is a "shield" and not a "sword," although the City tries to use it offensively. It allows the parties to protect the integrity of their agreement were some entity to find a provision invalid. No provision of the Agreement is invalid, unlawful, or unenforceable, however.

The City does not claim the wage provision, standing alone, is illegal or invalid. After all, it paid raises under the provision for two years! The City's claim is that it has the unrestricted right to nullify the wage provision and that makes the provision invalid, unlawful, and unenforceable. That has nothing to do with the purpose of the savings clause, which does not really help the City's case. The City's argument is simply a brazen claim to unfettered, unilateral power.

A careful reading of the Agreement demonstrates that the parties did not intend to incorporate external law. The parties expressly provided in Article 4, section 3, that in case of civil emergency the Mayor may suspend the provisions of the Agreement "provided that rates and monetary fringe benefits shall not be suspended." This is the clearest evidence that the parties intended that employees would be paid in accordance with the terms of the Agreement throughout the term of the Agreement. Even in the case of a civil emergency, "rates shall not be suspended." This must mean that the City cannot suspend wage increases when there is no civil emergency.<sup>18</sup>

Reviewing the parties' Agreement, we can see that they knew how to cite and refer to enacted legislation and external law. Article 5 requires the City to comply with the Police Officer's Bill of Rights, "Section 112.531 et.

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<sup>18</sup> The City argues that this provision is inapplicable because the right to ignore certain provisions in a civil emergency is lodged in the Mayor or Mayor's designee and the "right to underfund is a right of the legislative body." (City brief, p. 25). That misses the point. The Agreement, which binds the Mayor, the City Manager and the City Commission, as well as the Union and its members, states that even in the most extraordinary domestic crises, the wage clause cannot be suspended. How then could the City Commission, which never has the power to suspend any provision of the Agreement, nullify the wage provision, when it does not even claim there is a crisis? And why would the parties even put in a provision regarding suspension of contractual provisions if the City had the inherent right to suspend any money-related provision in any case based on section 447.309(2)?



seq., Florida Statutes." Article 20 provides that the City must pay employees who are required to attend conferences "as provided in Section 112.061, Florida Statutes." Article 25 defines "the course of employment as provided by section 440.091, Florida Statutes (1987)" as the standard for payment of workers compensation. Article 35 prohibits participation in a strike and then states that the parties "agree to comply with the provisions of Florida Statutes 447.505 and Florida Statutes 447.507."

Obviously, these particular bits and pieces of external law are used in the parties' Agreement. Nowhere does the Agreement talk about the general use of external law, except in the savings clause, Article 33, where we are told that employee "benefits or protections granted by the laws of the State of Florida" are not to be deprived by any interpretations of the Agreement. The City's claimed option to negate the wage promise, of course, does not appear in the Agreement. Section 407.309(2) is not mentioned. It is appropriate to apply the interpretive maxim expressio unius est exclusio alterius, the expression of one thing is the exclusion of another.<sup>19</sup> Article 33 provides that the terms of the Agreement "constitute the entire agreement." The entire agreement does not include an option to negate the wage promise.

#### D. The Contract

The Agreement requires the payment of wages at certain rates. Nothing in the Agreement excuses that payment.<sup>20</sup> As a legislative body, the City Commission approved the collective bargaining agreement. That action contemplated three years of wage and merit increases. The City has not offered any reason that would justify underfunding because of a financial emergency situation, and the Arbitrator need not address such hypothetical circumstances. The Agreement is plain on its face. The wage increases should have been paid.

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<sup>19</sup> The parties "expressed" many statutory provisions. They should be held to have intended to exclude the operation of those not expressed, especially when their application could render the entire wage promise a nullity.

<sup>20</sup> Article 34 does allow for reopening of the agreement "[s]hould the people of the State of Florida approve a Constitutional Amendment which reduces the funding of local governments." That did not happen here.

Other arbitrators have reached the same result. No arbitrators have allowed employers to nullify their agreements. Arbitrator Charles Frost in City of Deerfield Beach, 98 Lab. Arb. Rep. (BNA) 1189 (1992), rejected any consideration of external law when that South Florida municipality reneged on its contract promise. As might be imagined, the City of Lake Worth argues that Frost was wrong. Frost appropriately focuses on the parties' contract, the source of his power, and finds a clear violation. Similarly, the three arbitration decisions involving the City of Lake Worth have found violations. In the January 6, 1993, unreported decision involving the City and the Palm Beach County P.B.A., Arbitrator Susan Brown rejected the City's reliance on external law, reciting the agreement's zipper and entire agreement clauses, the grievance definition, the limitation on the arbitrator's power, and other provisions. This Arbitrator, in an unreported decision involving the City and the I.B.E.W. on April 30, 1993, found a contract violation for many of the same reasons explained in this decision. Finally, Arbitrator Robert B. Hoffman in a May 7, 1993, unreported decision involving the City and the I.A.F.F., relied on the supreme court's Chiles opinion, rejected the City's reliance on a claimed right to underfund based on the management rights clause, and noted the importance of the zipper clause. He too found a contract violation in the failure to pay the wage increases.

The City argues that it is "most unfortunate that arbitrators see fit to deprive public employers of fundamental rights of government and to grant public employees the unconditional right to receive funding in direct violation of law." The arbitrators do not "deprive" parties of rights or "grant" parties rights. They read, interpret and apply contracts. It is "most unfortunate" that the City does not appreciate the binding nature of its obligations.

#### E. Final and Binding Decision

Although the citizens may be the ultimate judge of the actions of their elected officials, the parties have provided for a private, self-contained, and final-and-binding system for resolving disputes concerning alleged violations of their Agreement through arbitration. The Arbitrator's power is to enforce the Agreement, a binding pact between the City and the Union. The Arbitrator's power comes from the Contract and the power of his decisions depends upon fidelity to the terms of the Agreement.

One would have hoped now that the City has arbitrated and lost four virtually identical cases that it would turn its course of action towards

rebuilding its relationship with its employees and their unions. Regretfully, it is likely to continue to fight this battle in court. It persists in the belief that its word is good for as long as it wants to keep it and no longer.

The court's scope of review of an arbitrator's decision is very limited. See, e.g., City of Miami v. Aparicio, 503 So. 2d 966 (Fla. 3d Dist. Ct. App. 1987). As the Florida Supreme Court emphasized in Schnurmaching Holding, Inc. v. Noriega, 542 So. 2d 1327, 1329 (Fla. 1989), there is a need to "preserve the integrity of the arbitration process."<sup>21</sup> A court is in the business of enforcing promises, not allowing parties to break them.

Courts will not allow public employers to destroy the constitutionally-based right to bargain with broad claims of inherent governmental power. "The right to bargain collectively is a fundamental right and as such, it is subject to official abridgement only upon a showing of a compelling state interest." School Board of Seminole County v. Morgan, 582 So. 2d 787, 788, n.2 (Fla. 5th Dist. Ct. App. 1991) (enforcing arbitration award).

In this situation, the parties sought a decision by an arbitrator about their contract responsibilities. That is what they received. They agreed that this decision would be final and binding. No court should disturb that decision because, after all, it was the parties' bargain. Otherwise, all promises are worthless and society loses the glue of trustworthiness that holds it together.

The City of Lake Worth will undoubtedly reargue in court the same points it has made here regarding section 407.309(2). The unions will respond, explaining that it was not the intent of the State Legislature in providing legislation to foster collective bargaining to allow the public employer to renege on its promises more than halfway through a contract term. The statute must be read in a manner consistent with Florida's constitutional protection of the right of public employees to bargain collectively.

The term "to bargain collectively" has a well understood meaning. It means to give-and-take across the negotiation table, reach agreement (if you can), and then keep your promises. To read section 407.309(2) to allow the public employer to escape from its promises in the absence of the most compelling circumstances would make a mockery of collective bargaining. As Lewis Carroll wrote in Alice in Wonderland: "Everything's got a moral,

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<sup>21</sup> The Fifth District Court of Appeal recently relied upon and quoted at length from this opinion in a public sector labor case, enforcing an arbitrator's award. City of Mount Dora v. Central Florida P.B.A., 600 So. 2d 520 (Fla. 5th Dist. Ct. App. 1992).

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if you can only find it." Here the moral is: "When you make a deal, you live by it."

The Agreement controls, and it was violated here.

## VI. AWARD

The City violated the Agreement when it failed to pay wage increases due under Article 27 for fiscal year 91-92. By way of remedy, the employees should be made whole with all legal interest paid.

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Roger I. Abrams  
Arbitrator

Fort Lauderdale, Florida  
June 22, 1993

# Good Intentions—Questionable Results: Florida Tries The Primacy Model

Daniel Gordon\*

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### I. THE FLORIDA SUPREME COURT DISCOVERS THE FLORIDA CONSTITUTION

Twenty-five years after the adoption of the modern Florida Constitution,<sup>1</sup> the Florida Supreme Court recognizes the state constitution as a primary protection of individual rights for people in Florida. In 1989, the Florida Supreme Court recognized that the state constitution should be utilized first in an analysis involving assertions about violations of basic individual rights.<sup>2</sup> The court prioritized the Florida Constitution over the United States Constitution.<sup>3</sup> First, attorneys and the Florida courts should look to the Florida Constitution to protect individual rights, and only if the state constitution fails to protect individual rights should attorneys and the Florida courts apply the Federal Constitution to the issues involved in any case.

The Florida Supreme Court joins courts in other states that utilize their state constitutions as primary protection of individual rights including

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\* Associate Professor of Law, St. Thomas University School of Law, B.A. Haverford College, J.D. Boston College Law School.

1. The modern Florida Constitution is the result of major revisions to the 1885 Constitution approved by the Florida electorate in 1968.

2. See *In re T.W.*, 551 So. 2d. 1186, 1190 (Fla. 1989).

3. *Id.*

Oregon,<sup>4</sup> New Hampshire,<sup>5</sup> New Jersey,<sup>6</sup> Washington,<sup>7</sup> Texas,<sup>8</sup> Michigan,<sup>9</sup> and Vermont.<sup>10</sup>

The Florida Supreme Court signaled strongly that Florida constitutional practice should reflect the primacy model of constitutional application in which the state constitution is relied upon first to resolve individual rights problems.<sup>11</sup> Under the primacy model, state courts avoid utilizing the Federal Constitution until the state constitution fails to protect an activity protected by the Federal Constitution.<sup>12</sup> State courts that utilize a primacy approach wean themselves away from relying on the Federal Constitution as the basic protector of individual rights, thereby avoiding the relegation of state constitutions to the level of protecting rights only when the Federal Constitution fails to do so.<sup>13</sup>

The Florida Supreme Court has just begun the process of converting the Florida Constitution into the primary protection of individual rights. In 1989 and 1990 the court recognized the primary strength and application of the Florida Constitution, but the court never developed a primacy model in

4. See *Oregon v. Kennedy*, 666 P.2d 1316, 1318 (Or. 1983).

5. See *New Hampshire v. Ball*, 471 A.2d 347, 351 (N.H. 1983).

6. See *New Jersey v. Hunt*, 450 A.2d 952, 953 (N.J. 1982).

7. See *Washington v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986); *Washington v. Langland*, 711 P.2d 1039, 1042 (Wash. Ct. App. 1989).

8. See *Heitman v. Texas*, 815 S.W.2d 681, 682 (Tex. Crim. App. 1991).

9. See *Michigan v. Bullock*, 485 N.W.2d 866, 870 (Mich. 1992).

10. See *Vermont v. Jewett*, 500 A.2d 233, 236 (Vt. 1985).

11. See Hans A. Linde, *First Things First: Rediscovering the State's Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

12. See Robert F. Utter and Sanford E. Pitler, *Presenting a State Constitutional Law Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 647-48 (1987); Charles G. Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 140-42 (1988); Ronald K. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 333-39 (1986); Stephen F. Aton, *State Constitutions Realigning Federalism: A Special Look at Florida*, 39 U. FLA. L. REV. 733, 768-73 (1987).

13. David J. Fine, *Project Report: Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 286-90 (1973); Wallace P. Carson, "Last Things Last: A Methodological Approach to Legal Arguments in State Courts", 19 WILLAMETTE L. REV. 641, 650-52 (1983); Earl M. Maltz, *False Prophet-Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 435-37 (1988); Ronald K. Collins, *Reliance On State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 14-15 (1981); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500-02 (1977).

a meaningful fashion.<sup>14</sup> In 1992, the court finally faced the task of developing the intricacies of a primacy model,<sup>15</sup> but the court subsequently failed to apply its own interpretive methodology forcefully.<sup>16</sup>

## II. PRIVACY AND THE INITIATION OF PRIMACY

Abortion and death provided the Florida Supreme Court with opportunities to recognize the primacy application of article I of the Florida Constitution. In 1989, the Florida Supreme Court in *In re T.W.*<sup>17</sup> recognized the right of a female minor to obtain an abortion without the consent of the minor's parent. The *T.W.* court struck down a Florida statute that required minors to obtain parental consent for an abortion,<sup>18</sup> finding that the statute violated the Florida constitutional privacy provision.<sup>19</sup> A year later, the Florida Supreme Court held in *In re Browning* that a surrogate for an incompetent patient suffering from an incurable terminal disease could order life-prolonging medical procedures withheld from the patient.<sup>20</sup> The surrogate attempted to follow a written directive from the patient requesting discontinuation of nutrition and hydration provided by medical technological means.<sup>21</sup> The court allowed surrogates for incompetent, terminal patients to discontinue life prolonging procedures when the patient expressed orally or by a written directive her or his will to die.<sup>22</sup> The Florida Supreme Court based its decision on the Florida constitutional right to privacy,<sup>23</sup> just as it had done the previous year in *T.W.*

The *T.W.* court adopted a primacy approach for the application of the Florida Constitution by utilizing a two-step analysis for cases involving a constitutional issue.<sup>24</sup> First, the court examined the parental consent statute

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14. See discussion *infra* part II.

15. See discussion *infra* part III.

16. See discussion *infra* part IV.

17. 551 So. 2d 1186 (Fla. 1989).

18. See FLA. STAT. § 390.001(4)(a) (Supp. 1988).

19. *In re T.W.*, 551 So. 2d at 1196 (citing FLA. CONST. art. I, § 23(1980)). Article I, section 23 provides: "Every natural person has the right to be let alone and free from government intrusion into his private life except as provided herein." FLA. CONST. art. I, § 23 (1980).

20. 568 So. 2d 4 (Fla. 1990).

21. *Id.* at 8.

22. *Id.* at 15.

23. *Id.* at 10; see also *In re T.W.*, 551 So. 2d at 1190.

24. *In re T.W.*, 551 So. 2d at 1190.

in the context of the Florida Constitution.<sup>25</sup> If the court had found that the Florida Constitution failed to protect a minor's right to choose an abortion without parental consent, the court would have moved to the second level of the analysis and applied the Federal Constitution.<sup>26</sup> The *Browning* opinion followed the lead of the *T.W.* opinion.<sup>27</sup> Although the *T.W.* court explicitly described a primacy approach composed of a two-step, state first, federal second, constitutional analysis, the *Browning* court only implicitly utilized a primacy approach by focusing solely on the state constitutional right to privacy as a source of rights protective law.<sup>28</sup>

While *T.W.* and *Browning* utilized the Florida Constitution as the primary basis for individual rights analysis and protection, neither case provided any depth into the primacy approach for applying the Florida Constitution. At best, both cases merely mouthed or pretended a primacy approach, creating a veneer of importance for the Florida Constitution. Neither case truly relied on a Florida-based legal analysis. Although *T.W.* explicitly stated that the parental consent statute would be examined first by the court under the Florida Constitution, the court actually based its analysis on an amalgam of federal constitutional legal doctrine and the national privacy policy.<sup>29</sup> The heart of the *T.W.* analysis relied on *Roe v. Wade*.<sup>30</sup> When the *T.W.* court defined the scope of the right to choose an abortion in Florida, the court utilized the trimester system developed in *Roe*.<sup>31</sup>

In the first pages of the *T.W.* opinion, the Florida Supreme Court outlined the history of federal abortion law relating to minors, describing the elements of the trimester system.<sup>32</sup> When the court finally defined the scope of Florida law, the court copied the basics of the *Roe* approach finding that until the end of the first trimester, women in Florida remain free to decide whether to abort a fetus free of state restriction.<sup>33</sup> After the end of the first trimester, the State of Florida may impose regulations safeguarding the health of the mother.<sup>34</sup> However, when the fetus becomes viable,

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25. *Id.*

26. *Id.* at 1190, 1196.

27. *In re Browning*, 568 So. 2d at 10.

28. *Id.*

29. See Daniel R. Gordon, *One Privacy Provision, Two Privacy Protection: The Right to Privacy In Florida After Roe v. Wade*, 5 WIS. WOMEN'S L.J. 81, 111-20 (1990).

30. See *In re T.W.*, 551 So. 2d at 1193; see also *Roe v. Wade*, 410 U.S. 113 (1973).

31. *In re T.W.*, 551 So. 2d at 1193; see also *Roe*, 410 U.S. at 160.

32. *In re T.W.*, 551 So. 2d at 1190.

33. *Id.*

34. *Id.*



the state may restrict all abortions to protect potential life.<sup>35</sup> The Florida Supreme Court differed with the *Roe* court on a definition of viability. The Florida Supreme Court viewed the *Roe* court as defining viability as the time at which the fetus becomes capable of meaningful life with artificial medical aid.<sup>36</sup> The *T.W.* court proceeded to define viability as meaningful life outside the womb through standard medical measures.<sup>37</sup> The court never explained the difference between artificial aid to a fetus and standard medical procedures for a fetus.<sup>38</sup> The court's utilization of *Roe* to define abortion rights in Florida occurred in the context of a discussion about general privacy policy.

The *T.W.* court set the stage for defining Florida abortion law by reviewing general privacy policy. Instead of focusing on the importance of privacy to Floridians and state policy, the *T.W.* court meshed Florida constitutional doctrine with national privacy norms. The court viewed the concept of privacy as deeply rooted in the nation's political system and heritage,<sup>39</sup> relying on Justice Brandeis' dissent in *Olmstead v. United States*<sup>40</sup> to emphasize the importance of the right to be let alone.<sup>41</sup> The Florida court observed that a wide scope of federal privacy protection shields individual autonomy in personal decisions involving marriage, procreation, contraception, family relations, child rearing and education.<sup>42</sup> The *T.W.* court defined the Florida constitutional privacy law<sup>43</sup> by quoting from Professor Larry Tribe's works on national constitutional policy<sup>44</sup> and federal abortion cases such as *Thornburgh v. American College of Obstetricians & Gynecologists*.<sup>45</sup>

The *Browning* opinion paralleled the *T.W.* opinion. The court in *Browning* also asserted that the Florida Constitution provides the basic individual rights for people within the state.<sup>46</sup> The court relied heavily on the Florida constitutional privacy provision as the primary source of legal

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35. *Id.* at 1193.

36. *Id.*

37. *In re T.W.*, 551 So. 2d at 1194.

38. *See id.*

39. *Id.* at 1191.

40. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

41. *In re T.W.*, 551 So. 2d at 1191.

42. *Id.*

43. *Id.*

44. *See generally* LAWRENCE L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988).

45. 476 U.S. 747 (1986).

46. *In re Browning*, 568 So. 2d at 10.

authority for its decision.<sup>47</sup> At the same time, the *Browning* court recognized little Florida public policy reflected in Florida constitutional privacy law.<sup>48</sup> Unlike *T.W.*, *Browning* failed to rely heavily on federal constitutional law and vague national privacy philosophy referring sparingly to some federal constitutional law such as *Cruzan v. Director, Missouri Department of Health*.<sup>49</sup> Some of *Browning*'s procedural requirements for determining when a surrogate may order the end of life prolonging treatment paralleled aspects of *Cruzan*, such as the requirement of clear and convincing evidence of a patient's wishes.<sup>50</sup>

The *Browning* court, for the most part, avoided relying heavily on *Cruzan* or any other federal constitutional law. Instead, the *Browning* court utilized a universal or global analysis to determine the privacy rights of terminally ill patients. This global or universal analysis was intended to support the application of a state constitutional privacy provision, but more closely resembled a generalized common law analysis which reviewed a variety of cases across a spectrum of jurisdictions in order to synthesize a transcendent set of principles.<sup>51</sup>

The *Browning* court utilized cases from New York,<sup>52</sup> California,<sup>53</sup> and a number of other states<sup>54</sup> to develop a general theory of Florida constitutional law. The *Browning* court even bolstered its common law style analysis by referring to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.<sup>55</sup> Florida cases were utilized but only in tandem with case law from other states<sup>56</sup> or after the court laid a general policy foundation involving case law from

47. *Id.*

48. *See id.*

49. 497 U.S. 261 (1990).

50. *In re Browning*, 568 So. 2d at 15; *see also Cruzan*, 497 U.S. at 261.

51. For more on the common law, *see generally* JAMES R. STONER, COMMON LAW AND LIBERAL THEORY (1992); RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO AMERICAN LEGAL COMMUNITY (1987); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (1985).

52. *See In re Browning*, 568 So. 2d at 10 (citing *Shloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914)).

53. *In re Browning*, 568 So. 2d at 12 n.8 (citing *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986)).

54. *Id.* at 12 nn.7, 8.

55. *Id.* at 10.

56. *See Cruzan*, 497 U.S. at 261, where *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989), and other Florida cases implicating the right to refuse treatment are discussed either along with, or in the context of, cases from other states.

other states.<sup>57</sup>

The *T.W.* court also utilized Florida law but did so more broadly than the *Browning* court. The *T.W.* court surveyed the decisions of Florida cases that implicated the right to privacy under Florida law.<sup>58</sup> However, the court failed to clarify whether all of the cases mentioned involved the Florida constitutional right to privacy. For example, *Satz v. Perlmutter*<sup>59</sup> was decided prior to the effective date of the state constitutional privacy provision.<sup>60</sup> Even when the Florida Supreme Court relied on Florida case law to develop Florida constitutional policy, the court interjected federal constitutional law.<sup>61</sup>

The *T.W.* and *Browning* opinions supposedly reflected a commitment by the Florida Supreme Court to a primacy approach to the application of the Florida Constitution. In *T.W.* and *Browning*, the supreme court looked to Florida constitutional law as the first source of constitutional protection for individual rights in Florida. However, the court never followed through in developing primary Florida constitutional doctrines for the right to choose an abortion or the right to die. Instead, the court relied on federal constitutional law, national legal policy and philosophy, and an out-of-state based common law style analysis. This analysis has not only prevented the Florida Constitution from being the primary protection of individual rights, but also has effectively relegated the privacy provision to the least important source of legal protection for individuals.

The half-hearted nature of the primacy model adopted by the Florida Supreme Court in *T.W.* and *Browning* was particularly peculiar given the context of the state constitutional privacy provision. The Florida Supreme Court developed Florida constitutional policy for a privacy provision that the court in *T.W.* itself acknowledged was unusual. Only three other state constitutions contain an express, free standing privacy provision.<sup>62</sup> At the same time, the court found that the Florida constitutional privacy section provides greater protection than the Federal Constitution,<sup>63</sup> and should be read more expansively than any sections of the Federal Constitution which

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57. See *In re Browning*, 568 So. 2d at 12-14, where the court focuses primarily on Florida cases which have surveyed federal law and laws of other states.

58. *In re T.W.*, 551 So. 2d at 1192.

59. 379 So. 2d 359 (Fla. 1980).

60. FLA. CONST. art. I, § 23 (1980); see also *supra* note 19 and accompanying text.

61. See *In re T.W.*, 551 So. 2d at 1192 n.5, 1193.

62. *Id.* at 1190 n.4.

63. *Id.* at 1191-92 (citing *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985)).

only implicitly protect privacy.<sup>64</sup> It is unclear why the Florida Supreme Court avoided developing a doctrine based analysis and doctrine based on an analysis of Florida law and public policy considerations. Such a Florida-based analysis seems natural for a Florida constitutional provision not found in many other constitutions, federal or state. By relying in *T.W.* and *Browning* on federal constitutional policy, national privacy policy and a common law type analysis based on out of state cases, the Florida Supreme Court defied the unique nature of the Florida constitutional right to privacy.

The closest the *T.W.* court came to utilizing a Florida policy analysis was its application of a statute providing that unwed pregnant minors and unwed mothers may obtain medical care for their fetuses or children without obtaining permission from an unwed pregnant minor's parents.<sup>65</sup> The court viewed this statute as evidence of Florida's public policy to empower pregnant minors with the authority to choose treatment for their fetuses or children. The court found lacking the state's contention that a minor's procurement of an abortion implicated a compelling state interest, a position seemingly inconsistent with Florida's public policy of favoring the empowerment of unwed pregnant minors.<sup>66</sup> The Florida Supreme Court in *T.W.* and *Browning* in 1989 and 1990 avoided the expansive use of such a Florida based analysis.

### III. THE MATURATION OF THE PRIMACY APPROACH

The Florida Supreme Court in *T.W.* and *Browning* established a bare skeleton for a primacy application of the Florida Constitution. The Florida Supreme Court utilized a two-step approach for analyzing constitutional issues. First, the court applied the Florida Constitution—the Federal Constitution would only be applied if the Florida Constitution failed to provide individual rights protection. In doing so, the court utilized federal constitutional law, national policy, and a common law analysis based on non-Florida cases when applying the Florida Constitution, rendering *T.W.* and *Browning* primacy cases in name only. In 1992, the Florida Supreme Court in *Traylor v. State*<sup>67</sup> placed some Florida meat on the primacy skeleton erected in *T.W.* and *Browning*.

In *Traylor*, a convicted murderer complained that police obtained

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64. *Id.* at 1192.

65. *Id.* at 1195; see FLA. STAT. § 743.065 (1979).

66. *In re T.W.*, 551 So. 2d at 1195.

67. 596 So. 2d 957 (Fla. 1992).

murder confessions in violation of his right to counsel and his right against self-incrimination.<sup>68</sup> The Florida Supreme Court not only decided the criminal procedure issues against the convicted murderer,<sup>69</sup> but also engaged in an extensive discussion of how the Florida Bill of Rights<sup>70</sup> must be utilized in Florida litigation involving constitutional issues.<sup>71</sup> As it explicitly stated in *T.W.*, the Florida Supreme Court declared that the primacy model of applying a state constitution is now the law in Florida.<sup>72</sup>

What distinguished *Traylor* from *T.W.* and *Browning* was the supreme court's recognition that the primacy model must be utilized for every phrase and clause of the Florida Constitution.<sup>73</sup> *T.W.* and *Browning* involved the Florida constitutional privacy provision—which few other state constitutions include.<sup>74</sup> *Traylor*, conversely, involved Florida due process rights,<sup>75</sup> rights to counsel and confrontation,<sup>76</sup> and the equal protection clause.<sup>77</sup> The rights to due process,<sup>78</sup> equal protection,<sup>79</sup> confrontation,<sup>80</sup> and counsel<sup>81</sup> also comprise substantial portions of the United States Constitution's Bill of Rights. *Traylor* decisively concluded that the primacy model adopted in *T.W.* and *Browning* applied to more than just Florida constitutional provisions that differed substantially from the United States Constitution. After *Traylor*, the primacy model applies even where the words of Florida Constitution are similar to those of a federal constitutional provision.

The *Traylor* court's use of the primacy model differed from the *T.W.* and *Browning* approach in a more significant way. The *Traylor* court developed an explicit methodology for construing the Florida Bill of Rights provisions which require Florida's courts to primarily focus on factors unique to the Florida state experience.<sup>82</sup> The *Traylor* court never listed

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68. *Id.* at 960.

69. *Id.* at 970-73.

70. FLA. CONST. art. I.

71. *Traylor*, 596 So. 2d at 961-70.

72. *See id.* at 962; *see also* Robert F. Williams, *Review Essay: A Generation of Change in Florida State Constitutional Law*, 5 ST. THOMAS U. L. REV. 133, 142-43 (1992).

73. *Traylor*, 596 So. 2d at 962-63.

74. *See supra* notes 62-64 and accompanying text.

75. FLA. CONST. art. I, § 9.

76. *Id.* § 16.

77. *Id.* § 2.

78. U.S. CONST. amend. V.

79. *Id.* amend. XIV, § 1.

80. *Id.* amend. VI.

81. *Id.*

82. *Traylor*, 596 So. 2d at 962.

some of the factors which demonstrated the uniqueness of the Florida experience. Those factors listed were:

1. Express language of the constitutional provision.
2. The formative history of a constitutional provision.
3. Preexisting and developing state law.
4. Evolving customs, traditions, and attitudes within the state.
5. The general history of Florida.
6. External influences that may have shaped state law.<sup>83</sup>

This utilization of factors involving the Florida experience differed markedly from the court's approach in *T.W.* and *Browning*, where the court utilized at most the last factor listed by the *Traylor* court (external influences that may have shaped state law) to the exclusion of all other factors. The *T.W.* and *Browning* courts focused exclusively on federal constitutional, national privacy policy, and non-Florida based common law analyses.<sup>84</sup>

The *Traylor* court rationalized its adoption of a comprehensive primacy application of the Florida Constitution by providing a federalistic, philosophical context for its decision. The Florida Supreme Court conceived of state constitutions in classical textbook federalism terms.<sup>85</sup> The court observed that the federal constitution provides the floor for basic freedoms, while state constitutions represent the ceiling.<sup>86</sup> The federal constitutional floor allows the United States to find an individual rights common ground or common denominator, facilitating homogeneity in a pluralistic polity.<sup>87</sup> The state constitutional ceiling provides the opportunity for each state to express a deeper commitment to freedom and individual rights.<sup>88</sup> The state constitutions allow for flexibility and elasticity unavailable in a constitution which protects people uniformly throughout the fifty states.<sup>89</sup> Because the states provide a wider spectrum of individual rights opportunities, state protected individual rights must be the primary rights for Americans, especially when American government is conceived as a limited government which maximizes individual freedom and minimizes government interfer-

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83. *Id.*

84. See *supra* notes 29-57 and accompanying text.

85. See William F. Swindler, *Minimum Standards of Constitutional Justice: Federal Floors and State Ceilings*, 49 Mo. L. REV. 1 (1984).

86. *Traylor*, 596 So. 2d at 962.

87. *Id.*

88. *Id.*

89. *Id.* at 961.

ence.<sup>90</sup>

The court in *Traylor* remained true to its federalist philosophy and its own primacy model when it analyzed whether the state had violated the due process and equal protection rights of the convicted murderer in *Traylor*. The *Traylor* court stayed close to the factors developed by the court to reflect the unique Florida experience in a Florida constitutional analysis.<sup>91</sup> The court thoroughly toured Florida legal history to investigate the scope of Florida confession law utilizing cases from 1853,<sup>92</sup> 1889,<sup>93</sup> 1898,<sup>94</sup> and 1925<sup>95</sup> in an attempt to explore the common law roots of the law. Common law principles governing Florida confession law became subsumed in 1896 under the Florida constitutional protection against compelled self-incrimination.<sup>96</sup> The *Traylor* court also focused on the simple and direct language of the right to counsel provision, recognizing historical contexts for the Florida language.<sup>97</sup> The court looked to historical and modern state legislation to understand right to counsel policy in Florida, finding such policy reflected in the right to counsel provision.<sup>98</sup> Even court promulgated rules were utilized by the *Traylor* court to find evidence of basic Florida policy reflected in the equal protection clause of the Florida Constitution.<sup>99</sup>

*Traylor* provided substance to the application by the *T.W.* and *Browning* courts of a primacy model for individual protection under the Florida Constitution. Whether the *Traylor* court established an enduring and meaningful primacy role for the Florida Constitution will have to be tested.

#### IV. PRIMACY AFTER *TRAYLOR*: JOHN DOE: BACK TO THE FUTURE OR ON TO THE FUTURE?

The *Traylor* court mandated that the Florida courts utilize the Florida Constitution, specifically the Bill of Rights, in a comprehensive fashion.<sup>100</sup> The Florida constitutional analysis model adopted by the *Traylor* court

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90. *Id.*

91. *Traylor*, 596 So. 2d at 962.

92. *Simon v. State*, 5 Fla. 285 (1853).

93. *Coffee v. State*, 6 So. 493 (Fla. 1889).

94. *Green v. State*, 24 So. 537 (Fla. 1898).

95. *Nickels v. State*, 106 So. 479 (Fla. 1925).

96. *See Ex parte Senior*, 19 So. 652 (Fla. 1896).

97. *Traylor*, 596 So. 2d at 967.

98. *Id.*

99. *Id.* at 969.

100. *Id.* at 962-63.

included the in-depth utilization of factors that developed the unique Florida policy interests reflected in and by the Florida Constitution. Five months after *Traylor* was decided, the Florida Supreme Court tested its new commitment to the comprehensive Florida constitutional primacy model when the court decided *Post-Newsweek Stations, Florida Inc. v. Doe*.<sup>101</sup>

*Doe* involved criminal charges against an alleged prostitute and her deputy sheriff husband who were charged with prostitution,<sup>102</sup> living off of the proceeds of prostitution,<sup>103</sup> and illegal wiretapping.<sup>104</sup> As part of the investigation of the criminal defendants, the police raided the accused's home, seizing cassette tapes containing recorded telephone conversations, business cards of alleged customers, and a Rolodex with names and addresses of customers in it.<sup>105</sup> When the state decided to disclose the seized information to the accused in accordance with discovery rules, individuals, John Does, mentioned or listed in the cassette tapes, business cards, or Rolodex, moved to deny public access to the pretrial discovery materials.<sup>106</sup> The John Does had not been charged with any crimes and moved to deny public access because criminal investigative information becomes public information when the state provides requested information to a defendant.<sup>107</sup> The John Does lost their fight to keep their names and addresses from becoming public.<sup>108</sup> The Florida Supreme Court affirmed the decisions of the courts below, allowing the names and addresses of the John Does who did not face criminal charges to become public.<sup>109</sup>

The Florida Supreme Court in *Doe* utilized a primacy approach focusing almost exclusively on the Florida constitutional right to privacy as the basis of the individual rights analysis.<sup>110</sup> The court applied some federal constitutional law principles involving privacy,<sup>111</sup> but the court spent most of its efforts discussing Florida common law principles and

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101. 612 So. 2d 549 (Fla. 1992).

102. *Id.* at 550; *see also* FLA. STAT. § 796.07 (1991).

103. *Doe*, 612 So. 2d at 550; *see also* FLA. STAT. § 796.05 (1991).

104. *Doe*, 612 So. 2d at 550; *see also* FLA. STAT. § 934.03 (1991).

105. *Doe*, 612 So. 2d at 550.

106. *Id.*

107. *See* FLA. STAT. § 119.011(3)(c)(5)(1991); *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988).

108. *Doe v. State*, 587 So. 2d 526, 528 (Fla. 4th Dist. Ct. App. 1991).

109. *Doe*, 612 So. 2d at 553.

110. *Id.* at 552.

111. *Id.* at 552-53 n.3.



Florida public policy considerations.<sup>112</sup> The court's analysis involved Florida public policy balancing of conflicting interests. The court balanced the policy impacts of allowing criminal discovery to be utilized by the press to gather information against the Florida tradition of open records.<sup>113</sup> The court expressed concern that allowing the media to utilize criminal discovery to gather news information could dissuade witnesses and victims from divulging investigatory information to law enforcement authorities in an effort to avoid personal information from being publicly disclosed.<sup>114</sup> The court opted to give the greater weight to legislative policy involving open records, finding that in camera inspections by trial judges would be sufficient to protect private information.<sup>115</sup>

The court utilized its Florida public policy analysis to support its finding that the names and addresses failed to be protected by the Florida constitutional right to privacy.<sup>116</sup> The John Doe's privacy rights, at least in terms of names and addresses, were not implicated when the information involved their own criminal activity.<sup>117</sup> The Florida Supreme Court followed the primacy model that the court developed in *Traylor*, but the court failed to utilize extensively the factors indicating unique Florida interests.<sup>118</sup> Overall, the court's analysis was curt and conclusory, overlooking factors such as the language of and the formative history of the state constitutional right to privacy. The court overlooked the following important indicators of Florida policy:

1. The language of the Florida constitutional privacy provision states explicitly that the privacy provision "shall not be construed [by the courts] to limit the public's right of access to public records and meetings as provided by law."<sup>119</sup> Those words need to be read within the context of the historical developments of that provision.

2. The legislative history<sup>120</sup> for the current privacy provision placed on the 1980 ballot<sup>121</sup> is sparse, but does indicate that the privacy

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112. *Id.* at 552 (citing *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988)).

113. *Id.* at 552-53.

114. *Doe*, 612 So. 2d at 553.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. FLA. CONST. art. I, § 23 (1980).

120. Conference Comm. Rep. on Fla. CS for HJR 386 (1980 Sess.) (on file with committee)

121. See FLA. CONST. art. XI, § 5.

provision created a general right to be let alone from government interference<sup>122</sup> that is experimental in scope.<sup>123</sup> The privacy provision embarked Florida into uncharted territory for privacy protection. The people of Florida took the opportunity to provide themselves with a broad and general privacy protection. The *Doe* court failed to take the broad and experimental nature of the privacy provision into consideration in its policy balancing analysis.<sup>124</sup> The court gave preference to public record policy.<sup>125</sup> This was clearly required, given the explicit words in privacy provision concerning public records. However, the court neglected the strong privacy concerns implicated in the privacy provision.

3. The court also overlooked formative history of the privacy provision.<sup>126</sup> The privacy provision was first considered by the 1977-78 Constitutional Revision Commission where concerns about increasing governmental encroachment on private information were expressed. The principal aim of the privacy provision was to afford individuals protection against collection, retention, and use of information about personal information.<sup>127</sup> The privacy provision reflected the fears of citizens about potentially abusive powers of the State of Florida to invade and expose private lives.<sup>128</sup> The *Doe* court minimized such concerns. *Doe* involved the sex lives of individuals not charged with sex crimes. The sensitive nature of a name, which had been included in a prostitute's records, was overlooked by the *Doe* court when it focused on the alleged criminal activity of the John Does. The court implied that involvement in criminal activity somehow ended the protection against public exposure, but the court neglected to recognize that the John Does remained uncharged at the time of the disclosure. In the context of the early supporters' concerns for a Florida constitutional privacy provision, such an oversight by the court

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122. See Staff of Fla. H.R. Comm. on Gov'tl Ops. for CS/HJR 387 (Feb. 7, 1980) (on file with committee).

123. See Staff of Fla. H.R. Comm. on Com., CS for HJR 387 (1980) Staff Analysis and Memorandum from S. Staff to S. President (Oct. 22, 1980) (on file with committee).

124. *Doe*, 612 So. 2d at 551.

125. *Id.* at 552.

126. See generally Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right to Privacy*, 6 FLA. ST. U. L. REV. 673 (1978); Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 633 (1977); Joseph S. Jackson, *Interpreting Florida's New Constitutional Right of Privacy*, 33 U. FLA. L. REV. 565 (1981).

127. See *Rasmussen v. South Fla. Blood Serv. Inc.*, 500 So. 2d 533, 536 (Fla. 1987).

128. See, e.g., 1978 Fla. Constitution Revision Comm'n proceedings at 6387, vol. 26 (March 8, 1978) (comments by Commissioner Douglas about 1984 approaching).

seems odd. The *Doe* court concluded that the mere appearance of an individual's name in records of an accused places the individual beyond Florida constitutional privacy protection.<sup>129</sup> Such a result runs counter to earlier concerns by privacy provision supporters about the prevention of a "1984" governmental information collection environment, because those charged with crimes become information collectors for Florida government on behalf of the media.

4. The *Doe* court also neglected to read the Florida provision within the context of policies reflected in other sections of the Florida Constitution. By allowing the names and addresses of the John Does to be exposed as public information, the court allowed individuals to be characterized through court proceedings as clients of a prostitute. The John Does would be branded as participating in criminal activity without being afforded the right to be free of such taint until the state proved wrongdoing. The formalities involved in the right to due process,<sup>130</sup> confrontation,<sup>131</sup> and counsel<sup>132</sup> remained overlooked by the supreme court as the court viewed the state right to privacy.

## V. CONCLUSION

The future of the primacy model which evolved in *T.W., Browning*, and *Traylor* remains unclear. The *Doe* court applied the basics of the *Traylor* state constitutional interpretive model, but overlooked significant aspects of the model. The comprehensive nature of the *Traylor* court's thinking failed to be reflected in *Doe*. As the Florida Constitution of 1968 heads toward its thirtieth anniversary, doubt about the role of the Florida Constitution in protecting basic human rights of Floridians continues to exist.

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129. *Doe*, 612 So. 2d at 553.

130. FLA. CONST. art. I, § 9.

131. *Id.* § 16, cl. (a).

132. *Id.*

# Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow

**John Sanchez\***

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## I. INTRODUCTION

The law of privacy is a patchwork of disparate doctrines that resembles Dr. Johnson's definition of metaphysical poetry: "the most heterogeneous of ideas yoked by violence together." The right to be let alone, as coined by Judge Cooley, covers tort-based privacy, constitutional privacy embodying personal autonomy and search and seizure. The lines are blurred and each shades into the other. As a result, it is not surprising to find that the law has trouble keeping them straight.<sup>1</sup>

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\* Professor of Law, Nova University Shepard Broad Law Center. Special thanks to Scott Solkoff's singular research skills.

1. See generally Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Milton R. Konvitz, *Privacy and the Law*:

Florida's Constitution first embraced a right to privacy in its search and seizure provision.<sup>2</sup> Article I, section 12 was amended in 1968 (by referendum), adding private communications to the interests protected by the clause.<sup>3</sup> In 1983, Florida's protection of privacy ebbed after voters amended section 12 to conform with United States Supreme Court interpretations of the Fourth Amendment to the Federal Constitution. In *Bernie v. State*,<sup>4</sup> the Florida Supreme Court ruled that the conformity amendment binds Florida courts to follow future decisions of the United States Supreme Court.<sup>5</sup> In this regard, Florida's conformity clause chilled individual liberties and placed federalism in a deep freeze.

In November of 1980, Florida voters adopted a freestanding constitutional amendment protecting privacy. Section 23 of the Florida Constitution provides: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."<sup>6</sup> On the surface, section 23 seemed to offer the public more blanket privacy protection while artfully upholding Florida's strong presumption of access to public records. The amendment was hailed as a giant step forward in safeguarding individual privacy.<sup>7</sup>

From the distance of fourteen years, a key question is whether Florida's constitutional privacy protection has made a difference? Gathering countervailing forces have cast a shadow on section 23 and put privacy's promise on hold. In part, blame lies with the overabundance of caution by Florida courts which seem reluctant to take section 23's straightforward command at face value; however, blame also lies with the turning tide of the law, leaving privacy by the wayside. For example, the United States

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*A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272 (1966); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

2. FLA. CONST. art. I, § 12.

3. See FLA. CONST. art. I, § 12 (1968 revision).

4. 524 So. 2d 988 (Fla. 1988).

5. *Id.* at 991.

6. FLA. CONST. art. I, § 23 (added Nov. 4, 1980).

7. E.g., Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 673 (1978) [hereinafter Cope, *To Be Let Alone*] ("Ratification would place Florida among the national leaders in an emerging trend to protect individual privacy."). Cope's article traces proposals of the 1978 Constitutional Revision Commission, and weighs how constitutional privacy would reshape Florida privacy law. *Id.*; see also Gerald B. Cope, Jr. *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (1977).

Supreme Court of the 1980's sharply pulled back on the use of privacy and scholars have noted how competing constitutional interests are strongly contesting privacy's turf.<sup>8</sup>

Hopes ran high when section 23 took effect, reflecting as it did a strong commitment to the right to be let alone. Unlike the unwritten and fragile federal privacy dimly perceived in the penumbras of the United States Constitution, Florida enshrined the principle that privacy is an interest in its own right, entitled to a prominent position in the state constitution. In sifting through section 23's legacy, performance should be measured by reach as well as by grasp.

If section 23 was more or less modeled along the lines of federal constitutional privacy, thus inheriting its metes and bounds, it would serve little purpose. However, the language of several leading section 23 cases claim that Florida's zone of privacy was designed to sweep wider than its federal counterpart. Yet, in the wake of fourteen years of scorekeeping, it's open to question whether section 23's salutary impact outweighs its shortcomings.

Enlarging the state zone of privacy might have meant that section 23 would fill in the blanks left by United States Supreme Court rulings. Measured by this principle, section 23 comes up empty. Another yardstick of its performance is to ask whether section 23's track record could have been achieved under alternative legal lines of reasoning. For example, Jehovah Witnesses are entitled to refuse blood transfusions in Florida, not by virtue of the right to privacy, but as a by-product of the free exercise of religion guaranteed under the federal charter.<sup>9</sup> Likewise, without invoking privacy, victimless crimes have been challenged under free speech and due process grounds and a gay parent's right to adopt children can be grounded on an equal protection footing.

Even when measured against the level of privacy protection prevailing when section 23 was adopted, the picture is mixed. For example, Florida's sodomy statute fell in 1971 before a First Amendment challenge.<sup>10</sup> With

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8. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down Florida's statutory ban on publication of name of rape victims in face of the First Amendment's guarantee of freedom of the press); Diane L. Zimmerman, *Requiem For A Heavyweight: A Farewell To Warren and Brandeis's Privacy Tort*, 68 CORN. L. REV. 291 (1983) (mapping out how the First Amendment defers to media definition of newsworthy and how this has eroded the privacy tort of disclosure of private facts).

9. See *In re Dubreuil*, 18 Fla. L. Weekly S575 (Fla. Nov. 4, 1993).

10. While section 800.01 was overturned, section 800.02 may still be read to bar private consensual sodomy. See *Mohammed v. State*, 561 So. 2d 384 (Fla. 1st Dist. Ct. App. 1990).

the possible exception of cases covering the right to die, Florida's privacy provision has made little dent in the state of the law.

If section 23 sweeps no wider than federal constitutional privacy, it serves little purpose save symbolism. The record of several states adopting constitutional privacy protection offers a window on section 23's untapped wealth. For example, California ensures bank depositors protection against subpoenas.<sup>11</sup> For a while, Alaskans could smoke pot at home under privacy's umbrella.<sup>12</sup> Some states outpace Florida even without tapping privacy. For example, Massachusetts and New Jersey relied on equal protection grounds to enable poor women to obtain free abortions.<sup>13</sup> While it's true that Congress' refusal to fund abortions was sustained in *Harris v. McRae*,<sup>14</sup> individual states are free to strike a different balance. This is one area where section 23 might have left its mark—a dramatic departure from federal law that would hammer home the fact that Florida's privacy protection is more than a prop, that it pays more than lip service to the right to be let alone.

To complicate matters, section 23's reach has been checked by voters. In the overlap where *Griswold* privacy shades into the Fourth Amendment's turf, the conformity amendment has placed a constitutional straitjacket on efforts to enlist privacy in the fight against undue searches and seizures. Simply put, Florida must ape United States Supreme Court Fourth Amendment rulings. Despite short-lived artful dodges by Florida courts to sneak section 23 in through the back door, search and seizure law stands undisturbed by section 23.

Privacy is left in limbo in light of other legal developments. All too often, the right to be let alone loses out to competing constitutional claims like the First Amendment. For example, the right of "John Does," uncharged of any crime, to preserve their anonymity in the Willets prostitution case was outweighed by the press' First Amendment right of access to "public records."<sup>15</sup> When Florida's Legislature tried, in the name of privacy, to bar the publication of the names of rape victims, the United States Supreme Court upended the statute under the banner of freedom of

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11. See, e.g., *Burrows v. People*, 529 P.2d 590 (Cal. 1974).

12. See, e.g., *Ravin v. State*, 537 P.2d 494 (Alaska 1975); ALASKA CONST. art. 1, § 22.

13. See, e.g., *Jaffe v. Sharp*, 463 F. Supp. 222 (D. Mass. 1978); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).

14. 448 U.S. 297 (1980).

15. *Post-Newsweek Stations, Fla. Inc., v. Doe*, 612 So. 2d 549 (Fla. 1992).

the press.<sup>16</sup> In *Atwell v. Sacred Heart Hospital*,<sup>17</sup> the natural mother's stake in preserving her anonymity had to give way to her child's right to know.<sup>18</sup>

Section 23 contains a built-in limitation that serves to blunt its impact. Unlike the broad reach of California's state constitutional privacy provision, section 23 governs only intrusions laid to the state.<sup>19</sup> While breaches of privacy are on the rise in private employment, remediable only under the largely orphaned tort of privacy, section 23 stands idly by. If the federal stance on narrowing state action is any guide, section 23 can be further weakened by rendering it harder to show state action. In doing so, worthy claims are discarded at the outset without reaching the merits. Finally, state action can serve as a double bind. By virtue of governing only public employment, section 23's privacy cases run the risk of being framed as search and seizure cases, thus lowering the iron curtain of the conformity amendment.

However, the picture is not altogether grim. Florida is probably as far-reaching as any state in empowering the dying with some measure of control over their fate. But one can conceive of a truly brilliant stroke: extending the right to die to authorizing doctor-assisted suicide.<sup>20</sup>

## II. FLORIDA PRIVACY LAW

### A. Public Records

Although Florida's public records law clings to the presumption of access to all governmental records,<sup>21</sup> there have always been exceptions

16. *The Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

17. 520 So. 2d 30 (Fla. 1988).

18. *Id.* at 31; see also FLA. STAT. § 395.017 (1991) (Florida's hospital record statute).

19. See FLA. CONST. art. I, § 23.

20. While many claim doctor-assisted suicide is a matter of policy best left to the Legislature, some cast the right to die as a constitutional right. For example, Dr. Kevorkian's lawyer argues that a constitutional right to physician-assisted suicide exists despite Michigan's February 1993 law banning assisted suicide. Michigan's law was enacted in response to nine suicides assisted by Kevorkian. See *Dr. Death Ordered to Stand Trial*, WASH. POST, Sept. 10, 1993, at A3. Michigan's ban on doctor-assisted suicides was deemed unconstitutional, but the appeals process has yet to run its course.

21. FLA. STAT. § 119.01 (1991). For a treatment of Florida's constitutional mandates on public records law, see Patricia A. Gleason & Joslyn Wilson, *The Florida Constitutional Open Government Amendments: Article I, Section 24 and Article 3, Section 4(e), Florida Constitution, Let the Sunshine In*, 18 NOVA L. REV. 973 (1993).



designed to protect privacy rights that may otherwise be invaded.<sup>22</sup> The second sentence of article I, section 23 recites that "[t]his section shall not be construed to limit the public's right of access to public records and meetings as provided by law." As case law on section 23 has developed, it has become evident that it is on a collision course with Florida's Public Records Act.<sup>23</sup> How to read the two together has been drawn into question in a number of cases, including one of the key section 23 cases to date.

Privacy loomed as the key issue in *Winfield v. Division of Pari-Mutuel Wagering*,<sup>24</sup> where the Florida Supreme Court held that the subpoena of bank records without notice to the account holders does not sacrifice their privacy interests.<sup>25</sup> Of more enduring value than the sundry facts or holding of the case, however, was what the court had to say about the footing and reach of the infant privacy provision.

When it comes to bank records, in other words, the right to privacy does not command notice to a bank depositor so long as the subpoena serves a state interest of the highest order. The opinion comes to this conclusion after sounding a clear standard of judicial review and a ringing declaration that Florida's right to privacy leaves its federal cousin in the dust.

Or does it? In *California Bankers Ass'n v. Shultz*<sup>26</sup> and *United States v. Miller*,<sup>27</sup> the United States Supreme Court held that a federal investigative agency may subpoena bank records without notifying the depositor.<sup>28</sup> In California, where the right of privacy looms larger than under the Federal Constitution,<sup>29</sup> the courts and Legislature have rejected the federal rule, thereby framing a procedure whereby a depositor may quash the subpoena.<sup>30</sup> Even though other states have also rejected the *California Bank-*

22. E.g., FLA. STAT. §§ 382.025 (birth records); 393.13 (retarded persons); 394.459 (clinical records of mental patients); 396.112 (alcohol treatment); 397.053, 397.096 (drug abuse); 400.321 (nursing home ombudsman committees); 827.07 (child abuse) (1979).

23. See Cope, *To Be Let Alone*, *supra* note 7, at 675.

24. 477 So. 2d 544 (Fla. 1985).

25. *Id.* at 548.

26. 416 U.S. 21 (1974).

27. 425 U.S. 435 (1976).

28. *Miller*, 425 U.S. at 455; *Shultz*, 416 U.S. at 68.

29. See PRIVACY PROTECTION STUDY COMMISSION, *PRIVACY LAW IN THE STATES* 9-11 (1977). The Commission was created by the Privacy Act of 1974, Pub. L. No. 93-579, § 5, 88 Stat. 1896, reproduced in comment to 5 U.S.C. § 552a (Supp. 1975).

30. CAL. GOV'T CODE § 7460 (Deering 1982); *PRIVACY LAW IN THE STATES*, *supra* note 29, at 12-13; cf. *Valley Bank v. Superior Court*, 542 P.2d 977 (Cal. 1975) (civil discovery).

ers/Miller rule,<sup>31</sup> Florida has not—despite section 23.

Among the earliest of “public records” cases is *Florida Board of Bar Examiners re: Applicant*.<sup>32</sup> In that case, a budding lawyer complained about questions posed by the Bar application calling for disclosure of psychiatric counseling—information which falls into the public domain. The court ruled that section 23 renders psychiatric counseling answers to bar application questions beyond the reach of public scrutiny.<sup>33</sup>

In *Miami Herald Publishing Co. v. Ferre*,<sup>34</sup> the court underscored that section 23 governs state and not private acts. In an abuse of process claim brought by a mayor against a private citizen who petitioned for disclosure of public records, the court ruled that absent state action, the mayor could not enlist the support of section 23. The court seemed to say that it was the party to the lawsuit who abused process, not the state which framed the law on which the underlying claim rested. Section 23 may be brought to bear only against governmental intrusions, not those undertaken by private parties.<sup>35</sup>

Section 23 may also yield at times to the public’s right of access to court records. In *Goldberg v. Johnson*,<sup>36</sup> the court let the light in on the terms of a settlement agreement and guardianship documents detailing the estate of Shepard Broad Law Center benefactor, Leo Goodwin, Sr.,

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31. In Alaska, bank records are confidential and shall not be made public without notice to the depositor, unless disclosure is sought under a valid search warrant. ALASKA STAT. § 06.05.175 (1993). In California, a bank customer is entitled to ten days notice before a state investigator can obtain access to his or her depositor records. CAL. GOV’T CODE § 7460 (Deering 1982). In Maryland, the customer must be given twenty-one days notice prior to disclosure. MD. CODE ANN., § 225 (1990). There is a fourteen day notice requirement in Oklahoma. OKLA. STAT. tit. 6, §§ 2201-2206 (1984).

32. 443 So. 2d 71 (Fla. 1983).

33. See Cope, *To Be Let Alone*, *supra* note 7, at 712 n.253, 713 n.254 (citing pre-section 23 Bar application question cases: Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968) (questions about sex with a minor—opinion did not address privacy, but Ervin, J., did in dissent); Florida Board of Bar Examiners *re* Eimers, 358 So. 2d 7 (Fla. 1978) (Florida Supreme Court under rational basis analysis held being gay does not render one unfit for Bar) and cases addressing the standards for disbarment: Florida Bar v. Kay, 232 So. 2d 378 (Fla. 1970) (disbarment for public gay conduct—Ervin, J., claims this amounts to invasion of privacy)).

34. 636 F. Supp. 970 (S.D. Fla. 1985).

35. Compare California’s Constitutional privacy provision which, alone among the states, entails no state action requirement. In other words, the conduct of purely private actors falls within the reach of the privacy provision.

One way to limit the reach of section 23 would be to follow the much debated example set by the United States Supreme Court of narrowing the definition of state action.

36. 485 So. 2d 1386 (Fla. 4th Dist. Ct. App. 1986).

overriding claims of privacy.<sup>37</sup> Unlike *Goldberg*, the court in *Sentinel Communications Co. v. Smith*<sup>38</sup> enlisted privacy in the service of barring newspaper access to sealed court records in a domestic relations case.<sup>39</sup> While the husband-father in the case happened to be a judge, this public office did not turn this private litigant into a public figure thereby strengthening the case for media access. Invoking privacy found under the Federal Constitution as well as section 23, the court noted that "if the privacy rights of the litigants and third persons in this case are not recognized and respected, then no citizen has any right of privacy in private litigation."<sup>40</sup> The court records remained under lock and key.

In light of *Smith*, it seems the law balances the nature of the records under review with privacy. Such delicate balancing was at work in *Rasmussen v. South Florida Blood Service, Inc.*<sup>41</sup> where the privacy interests of blood donors outweighed an AIDS victim's claim to subpoena names and addresses of blood donors who may have contributed the tainted blood.<sup>42</sup>

In another leading case, *Florida Freedom Newspapers, Inc. v. Sirmons*,<sup>43</sup> the court found that section 23 does not foreclose the press from obtaining court records shedding light on a state senator's divorce.<sup>44</sup> The court ruled that section 23 does not create a right to private judicial proceedings, unlike the Fifth District Court of Appeal in *Sentinel Communications Co. v. Smith*.<sup>45</sup> In concurring, Justice Nimmons added that "[w]hile I agree with the majority's statement that Article I, section 23 does not create a right to private judicial proceedings, it seems to me that such Florida constitutional provision deserves to be weighed as a significant factor in civil cases, particularly those in which the public's interests are not

37. *Id.* at 1390.

38. 493 So. 2d 1048 (Fla. 5th Dist. Ct. App. 1986), *rev. denied*, 503 So. 2d 328 (Fla. 1987) and *disapproved by* *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

39. *Id.* at 1049.

40. *Id.*

41. 500 So. 2d 533 (Fla. 1987).

42. *Cf.* FLA. STAT. § 627.429 (1991) (insurance companies may inquire about positive HIV test results, but may not disclose the information.).

43. 508 So. 2d 462 (Fla. 1st Dist. Ct. App. 1987), *aff'd sub nom.* *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

44. *Id.* at 465.

45. 493 So. 2d 1048 (Fla. 5th Dist. Ct. App. 1986), *review denied*, 503 So. 2d 328 (Fla. 1987).

involved.”<sup>46</sup> While confining its ruling to the underlying merits, the Florida Supreme Court affirmed in *Barron v. Florida Freedom Newspapers, Inc.*,<sup>47</sup> holding that “[a]ll trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions.”<sup>48</sup> The right to privacy, in other words, must yield in the face of a key tenet of our system of government: the presumption that all trials are public.

Echoing *Winfield*, the United States District Court for the Southern District of Florida held that Florida’s right of privacy does not foreclose a foreign government from reaching the American bank records of persons suspected of crime.<sup>49</sup> In their efforts to trace funds allegedly embezzled from the Haitian government during the Duvalier regime, a subpoena, issued on behalf of the new Haitian government, directed an American bank to turn over records of a depositor who was a Duvalier ally. The court held that Florida’s right of privacy did not stand in the way.<sup>50</sup>

In *Atwell v. Sacred Heart Hospital*,<sup>51</sup> the Supreme Court of Florida found itself in the thankless position of having to balance a child’s right to know against the rights of his natural parents. The court held that the natural parent’s stake in keeping their own medical records and, in turn, their identities, under wraps did not rule out their natural child, reared by foster parents, from prying the information out of its own medical records.<sup>52</sup>

In *Williams v. Minneola*,<sup>53</sup> police officers unthinkingly circulated photographs and a videotape of an autopsy. The decedent’s mother and sister brought an array of tort claims against the police, who raised the Public Records Act as a shield of immunity.<sup>54</sup> Moreover, the defendants

46. *Sirmons*, 508 So. 2d at 465 (Nimmons, J., concurring).

47. 531 So. 2d 113 (Fla. 1988), *aff’d sub nom.* *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462 (Fla. 1st Dist. Ct. App. 1987).

48. *Id.* at 114.

49. *In re* Letter of Request for Judicial Assistance from Tribunal Civil de Port-Au-Prince, Republic of Haiti, 669 F. Supp. 403 (S.D. Fla. 1987).

50. For a discussion of pre-section 23 bank depositor’s records cases, see Cope, *supra* note 7, at 691-693. Florida’s law in this area reflects federal law while California offers depositors broader protection. *Id.*

51. 520 So. 2d 30 (Fla. 1988).

52. See Paul J. Tartanella, Note, *Sealed Adoption Records & the Constitutional Right of Privacy of the Natural Parent*, 34 RUTGERS L. REV. 451 (1982) (biological parents decision to bring the child to term and place the baby for adoption instead of having an abortion may rest on State’s firm assurance that her identity will not be divulged).

53. 575 So. 2d 683 (Fla. 5th Dist. Ct. App. 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

54. FLA. STAT. §119 (1991).

enlisted section 23, attempting to stretch its last sentence to embody a grant of immunity for the disclosure of public records. The court took issue with this reading, ruling

that neither the Public Records Act nor the Florida Constitution grants a custodian protection against tort liability resulting from that person's intentionally communicating public records or their contents to someone outside the agency which is responsible for the records unless (1) the person inspecting the records has made a bona fide request to inspect them, in accordance with the Public Records Act, or (2) it is necessary to the agency's transaction of its official business to reveal the records to a person who has not requested to see them.<sup>55</sup>

In *Glatthar v. Hoequist*,<sup>56</sup> family members, thinking the aging testator wrote them out of his will, sought access to the document in the face of the testator's straightforward instructions preserving his will from their prying eyes while he lived.<sup>57</sup> When the trial court took custody of the will, the guardian of the now infirm testator sought to divulge the will's contents by asserting his ward's (the testator's) right to privacy. The court ruled that a mentally unfit person has not lost the right to privacy and that a guardian cannot defeat the ward's undeleagable stake in privacy.

The privacy interests of minors has also been endorsed under section 23. In *A.J. v. Times Publishing Co.*,<sup>58</sup> thirty children and their school sought to enjoin the release of police records detailing neglect and abuse. The court concluded the privacy interests of the children and school outweighed unfettered access to public records. The court backed its general constitutional privacy protection by enlisting public policy reflected in the Public Records Act's exemption for child abuse records.<sup>59</sup>

The Florida Supreme Court, following a growing number of states, relied on privacy to strike down a state statute compelling minors seeking abortions to obtain either parental consent or court approval. In its sweeping opinion in *In re T.W.*,<sup>60</sup> the court confirmed that the right of privacy under the Florida Constitution was broader than federal privacy

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55. *Williams*, 575 So. 2d at 687.

56. 600 So. 2d 1205 (Fla. 5th Dist. Ct. App. 1992).

57. *Id.* at 1207.

58. 605 So. 2d 160 (Fla. 2d Dist. Ct. App. 1992), *approved, cause remanded*, 626 So. 2d 1314 (Fla. 1993).

59. See FLA. STAT. §§ 119.07(3)(a), 415.51(1)(a), 39.411(4) (1991).

60. 551 So. 2d 1186 (Fla. 1989). *But see* State v. Avila, 44 Fla. Supp. 2d 131 (6th Cir. Ct. 1990).

protection. Given that a minor is deemed fit to consent to any other medical procedure tied to her pregnancy, the court assumed the girl could be entrusted with this decision as well.<sup>61</sup>

Florida is not alone in wielding its privacy law to combat restrictive anti-abortion-rights laws. In 1981, the California Supreme Court relied upon its privacy provision to strike down restrictions on state funded abortions.<sup>62</sup> States without written privacy protection have fallen back on equal protection.<sup>63</sup> It is unclear whether the court in *T.W.* would have reached the same outcome without section 23.

*Post-Newsweek Stations, Florida Inc. v. Doe*<sup>64</sup> arose after Sheriff Deputy Jeffrey Willets and his wife, Kathy, were charged with masterminding a prostitution ring. Among discovery materials were lists of clients who paid for Kathy Willets' sexual favors. These clients - "John Does" - sought to defeat the public disclosure of their names and addresses. The court weighed the public's statutory right of access to pretrial discovery information against the interests of these partners in crime to preserve their anonymity. Mindful of a media feeding frenzy, the Florida Supreme Court soberly ruled that the seal on identity must be lifted once a person is accused of a crime. In lone dissent, Justice Kogan chided the court for watering down privacy in the face of mere allegations of wrongdoing.

## B. Medical Decisions

Among the most high-profile of the privacy cases are those governing medical decision-making. An earlier case sets the stage. In *Satz v. Perlmuter*,<sup>65</sup> the Florida Supreme Court ruled that the right of privacy distilled from the United States Constitution affords competent, terminally ill adults the right to turn down or stop undue medical treatments if family members do not object.<sup>66</sup> The decision meshes with Florida's enlightened

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61. Though not ruling them out altogether, the United States Supreme Court had already held certain parental/judicial consent statutes to be unconstitutional. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). But see *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

62. *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

63. *Right To Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981).

64. 612 So. 2d 549 (Fla. 1992).

65. 379 So. 2d 359 (Fla. 1980).

66. *Id.*

rule that even infirm persons may lay claim to privacy.<sup>67</sup> The harder question is whether a guardian can ever embody that same right and refuse treatment on behalf of the ward.

The issue came to the fore in *In re Barry*,<sup>68</sup> where a district court decided that the right of privacy, embodied in both federal and state constitutions, entitles a guardian of an encephalitic infant to put a stop to artificial life support. Florida's Supreme Court has since revisited this Gothic theme. In *In re T.A.C.P.*,<sup>69</sup> the court defined an anencephalic child as legally alive, despite the absence of any higher brain stem activity.<sup>70</sup> In light of this finding, the court cast grave doubts on the parent's harvesting of organs of their anencephalic baby while she still breathed. A Nova attorney representing the parents vainly claimed that Florida's right to privacy enables parents to make such decisions. The court ruled privacy played no role: "We also do not agree that a parental right of privacy is implicated here, because privacy does not give parents the right to donate the organs of a child born alive who is not yet legally dead."<sup>71</sup>

However, in *J.F.K. Memorial Hospital, Inc. v. Bludworth*,<sup>72</sup> the Fourth District Court of Appeal relied upon the patient's right of privacy in protecting the right to die. Yet, in its next breath the court conceded that the comatose patient *sub judice* had no stake in the matter. Recognizing that "a terminally ill comatose patient . . . has a right to refuse medical treatment,"<sup>73</sup> the court nonetheless reckoned that the direct beneficiaries of the patient's death, the family, had the only tangible stake—financial savings and ending the emotional drain.<sup>74</sup> While *Bludworth* purports to recognize a right to die, its dicta seems to question that very holding.

The pace of right to die cases picked up once the Second District Court of Appeal decided *Corbett v. D'Alessandro*.<sup>75</sup> Drawing into question both the Florida and federal rights of privacy, the court enabled guardians to put a stop to forced feedings of comatose wards, notwithstanding Florida law

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67. See FLA. STAT. § 744.3215(1)(o) (1991); *Glatthar v. Hoequist*, 600 So. 2d 1205 (Fla. 5th Dist. Ct. App. 1992).

68. 445 So. 2d 365 (Fla. 2d Dist. Ct. App. 1984).

69. 609 So. 2d 588 (Fla. 1992).

70. *Id.*

71. *Id.* at 593 n.9.

72. 432 So. 2d 611 (Fla. 4th Dist. Ct. App. 1983), *certified question answered, quashed*, 452 So. 2d 921 (Fla. 1984).

73. *Id.* at 615.

74. *Id.* at 619.

75. 487 So. 2d 368 (Fla. 2d Dist. Ct. App.), *review denied*, 492 So. 2d 1331 (Fla. 1986).

that left no doubt that living wills cannot govern this form of life support.<sup>76</sup>

When the Supreme Court of Florida handed down its decision in *State v. Powell*,<sup>77</sup> supporters of privacy had good reason to fear that the court was scaling back privacy protection. *Powell* left intact state law<sup>78</sup> entitling coroners to preserve corneal tissue over objections lodged by decedent's family. Justice Shaw fired off a withering dissent, claiming that the offending law should yield before the legitimate privacy objection of decedent's kin.<sup>79</sup> Battle lines were forming.

If doubts were gathering about Florida's commitment to privacy, *In re Browning*<sup>80</sup> dispelled them. Estelle Browning, while competent, framed a living will detailing her objections to life supports if she were rendered unconscious.<sup>81</sup> Some time later, a stroke rendered her unable to talk, and, while not comatose, she endured Job-like afflictions. Unable to swallow, she was fed by a nasogastric tube. Upsetting the lower court's ruling that state law<sup>82</sup> vested control over feeding tubes beyond the reach of patients or their guardians,<sup>83</sup> the high court summoned up Florida's right of privacy, holding foresquare that section twenty-three embodies a "right of self-determination," enabling guardians to duly carry out a ward's instructions to terminate all forms of sustenance.<sup>84</sup> The court declared that the "right of privacy requires that we must safeguard an individual's right to chart his or her own medical course in the event of later incapacity."<sup>85</sup> In challenging a patient's right of self-determination, the State must show it has "a compelling interest great enough to override this constitutional right"<sup>86</sup>—no easy task.

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76. FLA. STAT. § 765.03(3)(b) (1991).

77. 497 So. 2d 1188 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987).

78. FLA. STAT. § 732.9185 (1991).

79. *Powell*, 497 So. 2d at 1194 (Shaw, J., dissenting).

80. 568 So. 2d 4 (Fla. 1990).

81. *Id.* at 8; *see also* FLA. STAT. § 765.05 (1991) (suggesting identical language).

82. Life-Prolonging Procedure Act of Florida, FLA. STAT. §§ 765.01-765.15 (1991).

83. The Act was amended prior to the *Browning* decision but after the cause of action arose to include the provision of sustenance in the definition of "life-prolonging procedure."

84. *Browning*, 568 So. 2d at 4.

85. *Id.* at 13.

86. *Id.* at 14.



### C. Blood Testing

*State v. Brewster*,<sup>87</sup> posed the question whether a sexually abused child could be forced to undergo AIDS testing. Balancing competing interests, the victim's privacy right to fend off governmental intrusion easily won out over the defendant's right to know, absent evidence of compelling need.<sup>88</sup> The case, meanwhile, leaves open the ripe question whether one may be pressed to undergo AIDS testing in the face of telltale signs that he or she carries the virus.

The Florida Supreme Court in *Fraternal Order of Police v. Miami*<sup>89</sup> approved drug testing<sup>90</sup> police officers in light of evidence of drug use, notwithstanding silence on the issue in the collective bargaining agreement. In concurring, Justice Kogan noted that the case "raises distinct problems" under section 23 and that those concerns will not go away.

The right to refuse a blood test is yet another by-product of section 23. *Department of Health & Rehabilitative Services v. Privette*<sup>91</sup> embodies the principle that a putative father may object to blood tests without weighing the child's best interest or the rights of the child's legal father.<sup>92</sup> Raising a privacy interest under section 23, the father called into question the best interests of the child. Therefore, whether the father has standing to raise the interests of the child is far from clear.<sup>93</sup> As stated by the court:

[A] compelling interest does not come into existence in the abstract but must be based on adequate factual allegations and a record establishing that the test itself is in the child's best interests. Absent that, the State's interest does not reach the threshold of being 'compelling': The blood test thus would be an improper intrusion into the putative father's privacy, if he has properly asserted this right. Art. 1, § 23, FLA. CONST. However, any such privacy claim is merely collateral to the overriding concern in the case: the child's best interests.<sup>94</sup>

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87. 601 So. 2d 1289 (Fla. 5th Dist. Ct. App. 1992).

88. *Id.*

89. 609 So. 2d 31 (Fla. 1992).

90. See also Wm. Andrew Hamilton, Note, *Constitutional Law—Drug Testing of Florida's Public Employees: When May a Public Employer Require Urinalysis?*—*City of Palm Beach v. Bauman*, 15 FLA. ST. U. L. REV. 101 (1987); Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553 (1988).

91. 617 So. 2d 305 (Fla. 1993).

92. *Id.*

93. *Id.* at 309.

94. *Id.*

In dissent, Justice Grimes observed that “[t]o suggest that Florida’s constitutional right to privacy permits a putative father to refuse a blood test in order to avoid the possibility of having to support his child offends ordinary principles of justice.”<sup>95</sup>

The religious-grounded refusal of a life-saving blood transfusion has been upheld by the Florida Supreme Court in *Public Health Trust v. Wons*.<sup>96</sup> Although the same outcome could be reached on privacy grounds, the court held that a Jehovah’s Witness was entitled to turn down a blood transfusion, even at the risk of leaving minor children motherless. This decision goes further than many states in striking the balance on the side of personal autonomy, despite the specter of minor children ending up as wards of the state.<sup>97</sup>

#### D. *Publication of Ads About Convicts*

In *Lindsay v. State*,<sup>98</sup> a court measured section 23 against a county’s policy of publishing drunk drivers’ mug shot, name and the caption “DUI--Convicted” in local newspapers. So long as the conditions of probation bear on the probationer’s past or future criminality or relate to the rehabilitative purposes of probation, the court reasoned, even constitutional rights can be trimmed, including the right of privacy.<sup>99</sup>

#### E. *Marijuana Possession*

Marijuana possession is one area where section 23 has not made a dent in the law. Unlike Alaska, which applied its state constitutional privacy provision to safeguard marijuana use in the home,<sup>100</sup> Florida courts have consistently ruled out any legal footing for marijuana use, twice before

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95. *Id.* at 310 (Grimes, J., dissenting).

96. 541 So. 2d 96 (Fla. 1989).

97. See also *St. Mary’s Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. 4th Dist. Ct. App. 1985) (adults without dependents entitled to refuse medical treatment on religious grounds).

98. 606 So. 2d 652 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 618 So. 2d 209 (Fla. 1993).

99. *Id.* at 356-57; see Scott Michael Solkoff, Note, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441 (1993) (weighing the abridgment of Fifth Amendment rights in the service of rehabilitation).

100. *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (invalidated statute barring possession of marijuana in home; privacy in the home enjoyed constitutional status as part of the right of privacy in the Alaska Constitution).

section 23, in *Borras v. State*<sup>101</sup> and in *Laird v. State*.<sup>102</sup> At the time of its conception, conservative critics of the proposed section held up legalizing marijuana use as one of the parade of horrors the constitutional provision would unleash upon an unwary public. They needn't have worried. *Maisler v. State*<sup>103</sup> affirmed Florida's longstanding article of faith that the right of privacy does not sanction the personal possession of marijuana.

#### F. *Sexual Matters*

Privacy plays a supporting role in state obscenity prosecutions. In *Parnell v. St. Johns County*,<sup>104</sup> a dancer challenged the constitutionality of a county ban on nudity in public places or in any establishment serving alcohol.<sup>105</sup> The court did not reach the merits of the claim, dismissing the case on procedural grounds. However, the ruling left dicta indicating that privacy's protective shield covers only natural persons—it cannot be raised by one's corporate employer in a pending federal suit.<sup>106</sup>

In *Schmitt v. State*,<sup>107</sup> the district court found that section 23 does not stand in the way of prosecuting a father for snapping nude pictures of his daughter, videotaping his daughter and another teenage girl dancing topless, and other "lewd and lascivious" activities.<sup>108</sup>

Similarly, in *Stall v. State*,<sup>109</sup> the State enlisted Florida's RICO Act in charging individuals for violations of state obscenity laws, as reflected in the rental, sale, and showing of "obscene" videos and publications.<sup>110</sup> The trial court struck down the obscenity statute, citing section 23. The Second District Court of Appeal reversed, ruling that section 23 does not shield obscenity.<sup>111</sup> Affirming the Second District, the Florida Supreme Court

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101. 229 So. 2d 244 (Fla. 1969), *cert. denied and appeal dismissed*, 400 U.S. 808 (1970).

102. 342 So. 2d 962 (Fla. 1977).

103. 425 So. 2d 107 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 434 So. 2d 888 (Fla. 1983).

104. 603 So. 2d 56 (Fla. 5th Dist. Ct. App. 1992).

105. *Id.*

106. *Id.* at 57.

107. 563 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), *approved in part and quashed in part*, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 112 S. Ct. 1572 (1992).

108. *Id.* at 1100.

109. 570 So. 2d 257 (Fla. 1990), *cert. denied sub nom.* Long v. State, 111 S. Ct. 2888 (1991).

110. *Id.* at 257.

111. State v. Long, 544 So. 2d 219 (Fla. 2d Dist. Ct. App. 1989), *approved sub nom.* Stall v. State, 570 So. 2d 257 (Fla. 1990), *cert. denied*, 111 S. Ct. 2888 (1991).

underscored that section 23 does not protect purveyors of sexually explicit products—there can be no reasonable expectation of privacy in the sale or purchase of such prurient products.<sup>112</sup> However, taking its cue from federal law, the court left little doubt, in dicta, that purely private possession of obscenity comes under section 23's protective umbrella.<sup>113</sup>

### G. Search and Seizure

In *Katz v. United States*,<sup>114</sup> the Supreme Court said that the Fourth Amendment protects people, not places.<sup>115</sup> Moreover, it warned against translating the Fourth Amendment into a general constitutional right of privacy.<sup>116</sup>

One way of setting search and seizure cases apart from *Griswold* privacy is to focus on the nature of the interest at stake in each. In the Fourth Amendment setting, privacy targets unfair and intrusive methods, processes, and procedures, while *Griswold* privacy entails substantive rights, like the right to an abortion.

A running theme in many criminal search and seizure cases in Florida is the weight due section 23 in light of section 12's "conformity amendment." Alone among the fifty states, Florida constitutionally commands its courts to count United States Supreme Court rulings as governing precedent when it comes to search and seizure. Since section 23 embodies wider protection of an individual's right to be let alone than does federal law, the privacy provision runs up against strict conformity with federal search and seizure law. Four Florida Supreme Court cases frame this theme.

In *Riley v. State*,<sup>117</sup> the Florida Supreme Court enlisted section 23 in striking down a warrantless helicopter search of a greenhouse. Sounding a bold note, Justice Barkett announced that "[o]ur own right to privacy amendment, article I, section 23, Florida Constitution, was meant to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques."<sup>118</sup> By invoking section 23, the court widened the protections against search and seizure, perhaps in defiance of the conformity amendment. On appeal, the United States

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112. *Stall v. State*, 570 So. 2d 257 (Fla. 1989), *cert. denied*, 111 S. Ct. 2888 (1991).

113. *Id.* at 261; *see Stanley v. Georgia*, 394 U.S. 557 (1969).

114. 389 U.S. 347 (1967).

115. *Id.* at 351.

116. *Id.* at 350.

117. 511 So. 2d 282 (Fla. 1987), *rev'd*, 488 U.S. 445 (1989).

118. *Id.* at 288.

Supreme Court, noting the waiver of federalism embodied in section 12's conformity amendment, reversed, holding that such warrantless searches do not tread on federal search and seizure law.<sup>119</sup> Some might say that *Riley* ironed out too many wrinkles.

This stinging rebuke has rendered Florida's Supreme Court's liberal wing slow to broaden search and seizure law in light of section 12 and *Riley*. In *State v. Wells*,<sup>120</sup> the court deemed inadmissible marijuana cigarettes left in an automobile's ashtray as well as a garbage bag of marijuana sealed inside a locked suitcase in the car's trunk. In that case, the DUI suspect consented only to a search of the trunk and the police fell short of legal grounds to open the telltale containers.

Without putting too fine a point on it, the court warily tapped section 23 to take exception to the "zone of privacy" framework. The same year as *Wells*, the court decided *Shaktman v. State*,<sup>121</sup> holding that although section 23 is triggered by the warrantless use of PEN registers, the compelling state interest test is met, thus putting to rest section 23 concerns.<sup>122</sup> When *Shaktman* is read alongside *Riley* and the conformity clause, it raises the specter that section 23 may still play a supporting role in Florida search and seizure cases, so long as the outcome squares with federal search and seizure law. *Shaktman* also sheds light on the history and footing of section 23. *State v. Jimeno*<sup>123</sup> underscores the tension between section 23 and section 12's conformity clause. Until then, the Florida Supreme Court had ruled that general consent to a car search did not cover the opening of a closed paper bag lying inside the vehicle. The United States Supreme Court reversed. Swallowing its pride, the Florida Supreme Court ruled section 12's conformity clause trumps section 23.<sup>124</sup> This uneasy "accommodation" of two clashing constitutional themes seems settled for the time being.

One interesting case recounts how Doreen Heller and her passenger were pulled over by police after a tag check matched the registration with

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119. *State v. Riley*, 488 U.S. 445 (1989).

120. 539 So. 2d 464 (Fla. 1989), *aff'd*, 495 U.S. 1 (1990).

121. 553 So. 2d 148 (Fla. 1989).

122. *Id.* at 151; *see* *Baird v. State*, 553 So. 2d 187 (Fla. 1st Dist. Ct. App. 1989) (same facts), *quashed*, 572 So. 2d 904 (Fla. 1990); *Hastetter v. Behan*, 639 P.2d 510 (Mont. 1982) (toll records of telephone subscribers are protected by Montana's constitutional guaranty of privacy); *see also* *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985) (setting up strict scrutiny analysis).

123. 588 So. 2d 233 (Fla. 1991).

124. *Madsen v. State*, 502 So. 2d 948 (Fla. 4th Dist. Ct. App. 1987), *aff'd*, 521 So. 2d 110 (Fla. 1988).

a different vehicle.<sup>125</sup> With license and registration in hand, it finally dawned on the officers that they had called in the wrong tag ID. Duly corrected, Heller was told she was free to go. Before pulling out, however, one officer noticed “track marks” on the passenger’s arms. Heller was instructed to leave the car for questioning. In due course, Heller confessed that illegal drugs were in the car. The ensuing search yielded the contraband.<sup>126</sup>

The Fifth District Court of Appeal, reversing the trial court’s admission of the drugs into evidence, grounded its ruling upon scant “founded suspicion” to warrant the second “Terry” stop.<sup>127</sup> Breaking new ground (or digging a ditch) in light of the conformity amendment, the court relied on section 23 to defeat the search and seizure.<sup>128</sup>

One case shedding light on the turf war waged by section 12 and section 23 is *Forrester v. State*,<sup>129</sup> in which the district court compared a section 12 analysis with a section 23 analysis.<sup>130</sup> The court did not rule on the merits of the section 23 claim since it was not raised below. The court did, however, map out a helpful comparison of the burdens of proof between section 23 and search and seizure law, hinting at the proper role section 23 might play.<sup>131</sup> In addressing the interplay between section 12 and 23, the court casts some role for section 23. But why lay out two competing tests of search and seizure law if one, section 12, governs?

125. *Heller v. State*, 576 So. 2d 398 (Fla. 5th Dist. Ct. App. 1991).

126. *Id.*

127. *Id.* at 399; see *Terry v. Ohio*, 392 U.S. 1 (1968).

128. *Heller*, 576 So. 2d at 400 (citing the Fourth Amendment of the United States Constitution and article I, sections 12 and 23 of the Florida Constitution).

129. 565 So. 2d 391 (Fla. 1st Dist. Ct. App. 1990).

130. *Id.*

131. The *Forrester* court stated:

In the search-and-seizure context, once a defendant has established that he or she had a reasonable expectation of privacy under the circumstances, and that a warrantless search and seizure occurred, the burden shifts to the state to demonstrate that the search was reasonable—that the state was not required to obtain a warrant under the circumstances . . . . In comparison, when a defendant raises a privacy challenge, the defendant must first show that the government has intruded into an area encompassed within the ‘zone of privacy’ protected by section 23. Only then does the burden shift to the state to demonstrate that the challenged intrusion “serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.” *Winfield*, 477 So. 2d at 547. The state’s burden in the search and seizure context is far less stringent than that under article 1, section 23.

*Forrester*, 565 So. 2d at 393 (some citations omitted).

In *State v. Kerwick*,<sup>132</sup> the court enlisted section 23 in finding that police overstepped the bounds of Fourth Amendment propriety. The case arose after officers cornered Kerwick's car, flashed their badges, and then "asked" if they could pick through her luggage as she awaited a bus. Feeling trapped, Kerwick consented to a search. Officers found a locked container inside her suitcase and sliced it open with a knife, revealing a bag of cocaine.<sup>133</sup> While paying lip service to the Fourth Amendment, the court embraced section 23 to find that Kerwick did not knowingly and voluntarily consent to the search.<sup>134</sup>

On the other hand, *Madsen v. State*<sup>135</sup> brings home the limited role section 23 plays in search and seizure cases. Federal opinions premised on section 12's conformity clause, have sustained the admissibility of an unauthorized tape recording capturing Madsen's complicity in drug trafficking. The court noted that absent the conformity amendment, the tape could not be tapped, but that now they were duty-bound to leave intact the trial judge's ruling of admissibility.<sup>136</sup> Madsen weighed in that the recording tread on his right of privacy as embodied in section 23. The court rejected the claim, lamenting, "[i]f we were to apply the right to privacy in the manner proposed by appellant, we would effectively nullify the constitutional amendment to section 12, and this is obviously not an appropriate judicial prerogative."<sup>137</sup> It is helpful to contrast the *Madsen* case with that of *State v. Calhoun*<sup>138</sup> in which the same court upheld a similar suppression order on grounds of section 12 and 23 violations.<sup>139</sup> In *Calhoun*, law enforcement intercepted jailhouse conversations between the suspect and his brother after assurances that their talks were private. The court cast aside governing case law owing that "none of those controlling decisions discussed the Article 1, sections 12 and 23, protections of the Florida Constitution cited above, but were decided on Fourth and Fifth Amendment principles."<sup>140</sup> To be sure, the two decisions clash over the footing of section 23 on search and seizure matters. The only way to meld the two opinions may be that, over time, the clout of section 23 has

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132. 512 So. 2d 347 (Fla. 4th Dist. Ct. App. 1987).

133. *Id.*

134. *Id.* at 348; *see also* Maulden v. State, 617 So. 2d 298 (Fla. 1993).

135. 502 So. 2d 948 (Fla. 4th Dist. Ct. App. 1987), *aff'd*, 521 So. 2d 110 (Fla. 1988).

136. *Madsen*, 502 So. 2d at 950.

137. *Id.* at 950; *see also* State v. Jimeno, 588 So. 2d 233 (Fla. 1991); State v. Hume, 512 So. 2d 185, 188 (Fla. 1987).

138. 479 So. 2d 241 (Fla. 4th Dist. Ct. App. 1985).

139. *Id.* at 245.

140. *Id.* at 244.

gathered force, though, of course, both opinions were rendered well before *Riley*.<sup>141</sup>

#### H. *Parents' Stake in Children's Lives*

Can grandparents win visitation rights over the objections of the child's parents? In *Sketo v. Brown*,<sup>142</sup> the appellate court brushed aside privacy claims raised by the parents, and instead adopted the "best interest of the child" test.<sup>143</sup> This standard measures the clashing interests between parents and grandparents, including the state's freestanding stake in the welfare of children.<sup>144</sup>

Whenever one person makes decisions for another person, a shift of privacy rights takes place. In the field of parental rights, the children's right to privacy is often subordinated to the parents or to the State.<sup>145</sup> For example, the privacy rights of "immature" minors may give way to the power of the parent or the State.<sup>146</sup> Similarly, a child's right to self determination yields to the State's power to compel education.<sup>147</sup>

#### I. *Victim Examinations*

In *State v. Drab*,<sup>148</sup> the district court would not order a second gynecological examination of an eight-year-old child allegedly abused by her father, unless the test was necessary to insure that the due process rights of the accused were not violated.<sup>149</sup> In framing the issue in these terms, the court sidestepped the privacy issue.<sup>150</sup> The court does not say why the privacy rights of the child or complaining witness do not figure into the legal equation. Perhaps because the compelling state interest test of

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141. See also *Adams v. State*, 436 So. 2d 1132 (Fla. 5th Dist. Ct. App. 1983) (audio and video recordings of a storefront "sting operation" did not violate defendant's right of privacy).

142. 559 So. 2d 381 (Fla. 1st Dist. Ct. App. 1990).

143. *Id.* at 382.

144. *Id.*

145. See generally *Privacy in Family and Home*, in 3 *PRIVACY LAW AND PRACTICE* ¶ 22 (George B. Trubow, ed., 1991).

146. *Bellotti v. Baird*, 443 U.S. 622 (1979).

147. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

148. 546 So. 2d 54 (Fla. 4th Dist. Ct. App.), *review denied*, 553 So. 2d 1164 (Fla. 1989).

149. *Id.* at 55.

150. *Id.*



*Winfield* yields the same outcome.<sup>151</sup>

In *State v. Brewster*,<sup>152</sup> a sexually abused child was free to forgo AIDS testing.<sup>153</sup> The appellate court reasoned that the victim's right to be let alone far outweighed the defendant's poorly articulated need for the information.<sup>154</sup>

## J. *Victimless Crimes*

To some there is no such animal as a victimless crime. Even those crimes which have no "direct" victim often leave indirect victims in their wake. This does not, however, put to rest the rather convincing argument that government should not police an individual's action when that act falls short of harming others. Section 23 may serve as a useful vehicle for those challenging governmental control over their private affairs.<sup>155</sup> To date, however, the Amendment has been rendered toothless. Case in point is the handling of the personal possession laws. In *Maisler v. State*,<sup>156</sup> the district court held its ground that Florida's right of privacy may not serve to strike down laws criminalizing the personal possession of marijuana.<sup>157</sup>

In *State v. Phillips*,<sup>158</sup> Phillips and Williams were charged with statutory rape. The trial judge struck down, as unconstitutional, the governing statute that barred consent as a defense.<sup>159</sup> The trial court held that the statute "violated the minor's right of privacy guaranteed by Article 1, Section 23 of the Florida Constitution. . . ."<sup>160</sup> The Fourth District Court of Appeal reversed, finding that Phillips and Williams lacked standing to assert the "victim's" right of privacy.<sup>161</sup> The appellate court did not tip its hand, however, regarding how a minor might ever challenge the statute's constitutionality, thus enabling a third party to assert the claim.<sup>162</sup>

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151. See also *State v. Diamond*, 553 So. 2d 1185 (Fla. 1st Dist. Ct. App. 1988).

152. 601 So. 2d 1289 (Fla. 5th Dist. Ct. App. 1992).

153. *Id.*

154. *Id.* at 1291.

155. FLA. CONST. art. I, § 23.

156. 425 So. 2d 107 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 434 So. 2d 888 (Fla. 1983).

157. *Id.*

158. 575 So. 2d 1313 (Fla. 4th Dist. Ct. App.), *review denied*, 589 So. 2d 292 (Fla. 1991).

159. *Id.* at 1314.

160. *Id.*

161. *Id.*

162. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Wyche v. Florida*,<sup>163</sup> the court construed a Tampa ordinance prohibiting loitering. The statute prohibited loitering

while a pedestrian or in a motor vehicle, in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering, or other lewd or indecent act. Among the circumstances which may be considered in determining whether this purpose is manifested are: that such person . . . repeatedly beckons to, stops or attempts to stop, or engages passers-by in conversation, or repeatedly stops, or attempts to stop motor vehicle operators by hailing, waving of arms or any bodily gesture. . . .<sup>164</sup>

The Florida Supreme Court struck the ordinance down as unconstitutionally vague, among other grounds.<sup>165</sup> In dicta, the court noted that "many of the activities implicated by the ordinance fall into the realm of personal autonomy that is protected by article I, section 23 of the Florida Constitution."<sup>166</sup>

#### K. *Commercial Speech*

Another hotbed of privacy litigation on a national scale is the permissible bounds of commercial speech. Florida's privacy right has come into play only once in this area. In *State v. Rampell*,<sup>167</sup> the court measured the First Amendment against the right of privacy in upholding the constitutionality of a state statute.<sup>168</sup> The statute barred uninvited, in-person, direct solicitation of clients by certified public accountants.<sup>169</sup> The court found the minimal right of free commercial speech to be outweighed by the right of the citizenry to be let alone.<sup>170</sup>

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163. 619 So. 2d 231 (Fla. 1993).

164. *Id.* at 233 (quoting TAMPA, FLA. CODE § 24-61A10 (1987)).

165. *Id.* at 234.

166. *Id.* at 235 n.5 (citing *In re Browning*, 568 So. 2d 4, 9-10 (Fla. 1990)).

167. 589 So. 2d 1352 (Fla. 4th Dist. Ct. App. 1991), *approved in part and quashed in part*, 621 So. 2d 426 (Fla. 1993).

168. *Id.* at 1353.

169. *Id.*

170. *Id.* at 1360.

### L. *Vagueness Doctrine*

The Florida Supreme Court's decision in *Wyche v. Florida*,<sup>171</sup> holds promise for privacy in its dicta.<sup>172</sup> The case concerned a City of Tampa ordinance prohibiting loitering.<sup>173</sup> The Florida Supreme Court ruled the ordinance unconstitutional on vagueness and other grounds.<sup>174</sup> In dicta, the court noted that "many of the activities implicated by the ordinance fall into the realm of personal autonomy that is protected by article I, section 23 of the Florida Constitution."<sup>175</sup> In time, this decision may prove a potent weapon to test the constitutionality of arguably over-broad statutes.<sup>176</sup>

### M. *Cable Television*

Florida privacy law has never addressed privacy concerns attending cable television. California, by contrast, makes it illegal for a cable television provider to use any electronic device to record, transmit, or observe any events inside a subscriber's premises.<sup>177</sup> In the District of Columbia, a cable franchisee must exercise "the highest possible standard of care" in not disseminating its subscriber's viewing selections, financial transactions, and/or the utilization of other cable-related interactive services.<sup>178</sup> This information may not be released even upon a valid subpoena or search warrant.<sup>179</sup> Connecticut, Illinois, New Jersey, and Wisconsin have similar laws.<sup>180</sup>

171. 619 So. 2d 231 (Fla. 1993).

172. See also discussion *supra* part II.J.

173. See *id.*

174. *Id.* at 234.

175. *Id.* at 235 (citing *In re Browning*, 568 So. 2d at 9-10).

176. See Nan Feyler, Note, *The Use of the State Constitutional Right of Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986); Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986) (federal and state cases). A few states have relied on state constitutional privacy provisions to strike down their sodomy statutes. *E.g.*, *Michigan Organization for Human Rights v. Kelley*, No. 88-815820CZ (Mich. Cir. Ct., Wayne County 1990) (covering both heterosexual and homosexual sodomy), *Kentucky v. Wasson*, No. 86-X-48 (Ky. Cir. Ct., Fayette County, 1990) (covering only homosexual sodomy).

177. CAL. PENAL CODE § 637.5 (West 1993).

178. D.C. CODE ANN. § 43-1845 (1992).

179. *Id.*

180. CONN. GEN. STAT. ANN. § 16-333 (West 1992); ILL. ANN. STAT., ch. 38, § 87-2 (Smith-Hurd 1993); N.J. REV. STAT. § 48:5A-1 (1992); WISC. STAT. ANN. § 134.43, 968.27(1) (West 1992).

### III. PRIVACY STATUTES OR CONSTITUTIONAL PROVISIONS IN OTHER STATES

Florida aside, other states have raised privacy to the level of constitutional codification, though with uneven results. In Alaska, as of 1972, "[t]he right of the people to privacy is recognized and shall not be infringed."<sup>181</sup> In Arizona, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."<sup>182</sup> In California, "[a]ll people are by their nature free and independent," and among their inalienable rights are "pursuing and obtaining safety, happiness, and privacy."<sup>183</sup> Hawaii's search and seizure law adds some interesting language to the familiar formula: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated. . . ."<sup>184</sup> Article one, section twelve of the Illinois Constitution provides that there shall be "prompt" and "certain" relief for "injuries and wrongs" to one's privacy.<sup>185</sup> Like Hawaii, Louisiana explicitly adds the right of privacy to its search and seizure provision.<sup>186</sup> In Montana, it is recognized that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."<sup>187</sup> In New York, the states' search and seizure provision is identical to its federal counterpart, except that the state adds language strengthening the sanctity of private communications.<sup>188</sup>

Other states, while not elevating their concerns to constitutional dimensions, have made provisions by legislative enactment. In Delaware, for example, violation of privacy is a Class A misdemeanor.<sup>189</sup> In Georgia and Louisiana, it is illegal to invade one's privacy or to be a "peeping Tom."<sup>190</sup> In Maine, a person is guilty of invasion of privacy if, under certain circumstances, he or she trespasses with the intent to eavesdrop or installs or uses any device that can transmit or record sounds or images.<sup>191</sup>

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181. ALASKA CONST. art. I, § 22.

182. ARIZ. CONST. art. II, § 8.

183. CAL. CONST. art. I, § 1.

184. HAW. CONST. art. I, § 5 (emphasis added).

185. ILL. CONST. art. I, § 12.

186. LA. CONST. art. I, § 5.

187. MONT. CONST. art. II, § 10.

188. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 1993).

189. DEL. CODE ANN. tit. 11, § 1335 (1992).

190. GA. CODE ANN. § 26-3002 (1993); LA. REV. STAT. ANN. § 14:284 (West 1992).

191. ME. REV. STAT. ANN. tit. 17-A, § 511 (West 1992).

In Massachusetts, "a person shall have a right against unreasonable, substantial or serious interference with his privacy."<sup>192</sup> Rhode Island enumerates Prosser's four traditional categories of tort privacy after its declaration that "It is the policy of this state that every person in this state shall have a right to privacy. . . ."<sup>193</sup> Utah's privacy protections are specifically strengthened in the area of eavesdropping and the misuse of listening or recording devices.<sup>194</sup>

In the area of tort privacy, most states recognize the traditional torts at common law, with the apparent exception of Minnesota, Nevada, North Dakota, and Wyoming.<sup>195</sup> It should also be understood that those states which have constitutionalized their right to privacy, often pass more specific legislation.<sup>196</sup>

#### IV. CONCLUSION

Thirteen years of parsing section 23 have taken the luster off privacy's promise. So far, hopes outrun reality. The cases bring sharply into focus that all too often privacy plays second banana to competing interests.

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192. MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989).

193. R.I. GEN. LAWS § 9-1-28.1 (1992).

194. UTAH CODE ANN. § 76-9-401 (1993).

195. ROBERT ELLIS SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS (1992).

196. *E.g.*, FLA. STAT. §§ 455.241 (Supp. 1992) (disclosure of medical records); 559.72 (Supp. 1992) (release of credit information); 659.062 (protection of social security numbers) (1991); MONT. CODE ANN. § 39.2-304 (1992) (polygraphs).

# There's No Place Like Home(stead) in Florida—Should it Stay that Way?

**Donna Litman Seiden\***

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\* Professor, Nova University Shepard Broad Law Center, Fort Lauderdale, Florida; J.D. Cum Laude, University of Florida, 1976; AB, University of Miami, 1973. Professor Seiden authored *An Update on the Legal Chameleon: Florida's Homestead Exemption and Restrictions*, 40 U. FLA. L. REV. 919 (1988) and co-authored *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227 (1978) (with Maines, J.A.).

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## I. SUMMARY OF PRESENT LAW AND HISTORICAL PERSPECTIVE

### A. *Summary of Present Homestead Exemption Law*

Florida's homestead law contains a unique combination of provisions providing an owner with significant exemptions from creditors and restrictions on transfer. This law is contained primarily within the Florida Constitution. These provisions affect the owner and the owner's spouse during their lifetimes. They also affect the owner's descendants and heirs after the owner's death.

The provisions relating to the exemption have several components.<sup>1</sup> The first relates to what qualifies as a homestead. The qualification requirements include ownership requirements, a residential use requirement, and an acreage limitation. The second relates to the scope of the exemption, whereby most liens cannot attach to the homestead or force its sale, with limited exemptions provided under constitutional, federal and judicial law.

The provisions relating to transfer apply to *inter vivos* transactions and to testamentary dispositions. The transfer restrictions relate to the right to give, sell, mortgage, or otherwise alienate the homestead during lifetime, and the right to devise it by will, as well as the right to benefit from the owner's exemption at his or her death.

This article will explore the exemption provisions and the transfer provisions in depth. This article will consider the present law, its history,

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1. See FLA. CONST. art X, § 4.



exemptions in other states, and potential areas and recommendations for constitutional or other reform.

### 1. Exemption Provisions

The present exemption contains the following qualification requirements and limitations: ownership requirements, a residential/use requirement and an acreage limitation. Article X, section 4(a) of the Florida Constitution exempts:

the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family

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#### *a. Qualification Requirements and Limitations*

The qualification requirements relate to who may own the homestead and what interest may be owned (the ownership requirements), how the property may be used (the residential/use requirement) and how much acreage the homestead may encompass (the acreage limitation). There is no limit on the value of the property that can qualify as a homestead.<sup>2</sup>

#### *i. Ownership Requirements*

First, any natural person may own the homestead interest. A corporation cannot claim the exemption for property that it owns.<sup>3</sup> The owner need not be married or have a family. If the owner has a family, the owner need not be the head of that family.

Second, the interest owned must be an interest in an estate in land located in the State of Florida.<sup>4</sup> The homestead interest may be the fee

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2. *See id.*

3. *See In re Duque*, 33 B.R. 201, 202 (Bankr. S.D. Fla. 1983). *But see Manda v. Sinclair*, 278 F.2d 629 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960) (shareholder could claim exemption for equitable interest in homestead owned by corporation).

4. *Coleman v. Williams*, 200 So. 207, 207 (Fla. 1941) (exemption "may attach to any estate in land . . . whether it is a freehold or less estate"); *Menendez v. Rodriguez*, 143 So. 223, 226 (Fla. 1932) (Whitfield, J., concurring).

simple interest of the sole owner, the interest of a tenant in common<sup>5</sup> or the interest of a joint tenant with right of survivorship.<sup>6</sup> The homestead may be owned as a tenancy by the entirety.<sup>7</sup> It may be an equitable interest owned via a purchase money resulting trust<sup>8</sup> or a constructive trust. It may

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5. *Hill v. First Nat'l Bank*, 75 So. 614 (Fla. 1917) (son's undivided one-third interest in property owned as a tenant in common qualified as homestead upon his death so that his interest passed to his mother free of his creditors); *Milton v. Milton*, 58 So. 718 (Fla. 1912) (son's undivided one-fourth interest in property inherited from mother qualified as son's homestead, immediately after her death, because son occupied it within a reasonable time under the circumstances after her death). Each tenant's interest should be tested separately to see if it qualifies as homestead. *Grant v. Credithrift of America, Inc.*, 402 So. 2d 486 (Fla. 1st Dist. Ct. App. 1981) (former husband's interest was subject to sale, but former wife claimed her interest as homestead). If one tenant has the exclusive right to possess the property, a sale of the other tenant's interest would be subject to that right. *Barnett Bank v. Osborne*, 349 So. 2d 223 (Fla. 4th Dist. Ct. App. 1977), *cert. denied*, 365 So. 2d 709 (Fla. 1978).

If homestead property is owned as tenants in common or joint tenants with right of survivorship, the property may be partitioned at a tenant's request. If neither is entitled to exclusive possession of the property and the property cannot be divided in a manner that preserves the homestead, a sale may be required to protect the owners' beneficial enjoyment of the property. *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978) (a partition sale is not a forced sale prohibited by the constitution).

6. A joint tenancy with right of survivorship may qualify for the exemption for forced sale but may not be subject to the restriction on devisee. *See Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d Dist. Ct. App. 1984) (husband's interest in property owned as joint tenants with right of survivorship with sister, sister's daughter, and sister's husband was not subject to restriction on devise, even though husband and wife resided on property and wife survived husband). In *Ostyn*, the right of survivorship was acquired prior to the marriage. *Id.* at 1137.

7. *See Wilson v. Florida Nat'l Bank & Trust Co.*, 64 So. 2d 309 (Fla. 1953).

8. A purchase money resulting trust arises when one person purchases property and has the title placed in another person's name without intending to make a gift to the title holder. *RESTATEMENT (SECOND) OF TRUSTS* § 443 (1957). *See Bessemer Properties, Inc. v. Gamble*, 27 So. 2d 832 (Fla. 1946) (husband purchased land in wife's name and constructed home on it and paid for insurance, upkeep and taxes). In *Bessemer*, the court stated that the husband's "contributions to his wife's separate property gave him an equitable interest on the basis of which he could claim his homestead exemption. It was not essential that he hold legal title to the land." *Id.* at 833. *See also Beall v. Pinckney*, 150 F.2d 467 (5th Cir. 1945) (husband can claim his equitable interest in a home titled in his wife's name as his homestead when he used his own funds to purchase it in his wife's name).

In these cases, the head of the family argued that he was the equitable owner because the legal owner was not the head of the family and could not qualify for the exemption. *Gamble*, 27 So. 2d at 833; *Beall*, 150 F.2d at 470. Under today's constitutions, where family hardship is not required, this argument could be used if the legal owner did not reside on the property but the "equitable owner" did.

be a beneficial interest held by the settlor of a revocable trust.<sup>9</sup> The homestead interest also may be a life estate held by a surviving spouse, but it cannot be a future interest, until the interest becomes possessory.<sup>10</sup> For example, a remainder interest cannot qualify as a homestead interest until the life estate terminates.<sup>11</sup> The homestead interest may be an interest in a duplex house<sup>12</sup> or a condominium.<sup>13</sup> It may be an ownership interest in a mobile home and in land to which the mobile home is attached.

Leasehold interests generally do not qualify as a sufficient estate in land.<sup>14</sup> Cooperatives do not qualify for the constitutional exemption,

9. *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th Dist. Ct. App. 1981) (devise restrictions applied to homestead owned by grantor, as trustee of revocable trust, where grantor was lifetime beneficiary and retained "all equitable right, title, possession and interest" in homestead); *Johns v. Bowden*, 66 So. 155 (Fla. 1914) (decedent who could not directly devise homestead could not indirectly devise homestead through provisions of revocable trust he created and under which he had the right to occupy and use the homestead during his lifetime).

10. *Aetna Ins. Co. v. LaGasse*, 223 So. 2d 727 (Fla. 1969). In *LaGasse*, when the father died, his wife received a life estate in his homestead and his daughter received the vested remainder. The father's homestead exemption inured to both of them to protect them from his creditors. The daughter resided with mother on the property, but daughter could not qualify for homestead exemption on her remainder interest even though she was head of the family. *Id.* at 728. The "surviving mother had the right of occupancy and use essential to a homestead claim . . ." *Id.* at 729. See also *Anamaet v. Martin-Senour Co.*, 114 So. 2d 23 (Fla. 2d Dist. Ct. App. 1959).

11. See *LaGasse*, 223 So. 2d at 728.

12. See *In re Kuver*, 70 B.R. 190 (Bankr. S.D. Fla. 1986). In *Kuver*, a duplex was homestead even though a portion was rented out. The land and improvements were owned in fee simple. The duplex was capable of being divided by a vertical or horizontal line but could not be divided for purposes of sale under existing zoning laws. The duplex was considered comparable to condominium ownership. *Id.* at 192-93.

13. See *In re Estate of Hill*, 552 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1989) (condominium was homestead, but devise of homestead was not prohibited because decedent was not survived by a spouse or minor child).

14. See *In re Tenorio*, 107 B.R. 787 (Bankr. S.D. Fla. 1989) (where year to year lease of condominium did not satisfy ownership requirement nor was it a permanent place residence, and thus could only qualify for the personalty exemption); see also *Freedom Properties v. Alderman*, 589 So. 2d 424 (Fla. 2d Dist. Ct. App. 1991) (resident's contractual license to occupy given room in retirement center was continuing contract under Florida Statutes chapter 651 but was not legal or equitable interest for claiming exemption for purposes of taxing any portion of real property containing center). There is some question whether leasehold improvements made by the lessee on leased property could qualify as a sufficient real estate interest for the lessee. See *Anderson Mill & Lumber Co. v. Clements*, 134 So. 588 (Fla. 1931). In *Clements*, a portion of land owned and used by a father-in-law as a homestead was treated as abandoned and not exempt when the father allowed the son-in-law to build a home on that portion of the land. The son-in-law had lawful possession of the

because the tenant of the cooperative apartment has no proprietary interest in his or her apartment, the apartment building, or the underlying land.<sup>15</sup> Mobile homes on leased land also should not qualify for the *constitutional* exemption. The Legislature has attempted to create a statutory exemption when the mobile home owner has the lawful right to possess the land.<sup>16</sup> The fact that property is taxed as real estate for property tax purposes is not determinative.<sup>17</sup> Furthermore, the fact that property qualifies for the homestead tax exemption is not determinative, because some of the

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land and resided there, yet a creditor of the father-in-law was able to place a lien against that portion of the land. That portion of the land was not considered part of the father-in-law's homestead. It is unclear whether the son-in-law tried to claim it as his homestead, but the court did not treat that portion of the land as the son-in-law's exempt homestead. *Id.* at 590. But see Harold B. Crosby & George J. Miller, *Our Legal Chameleon, The Florida Homestead Exemption: I-III*, 2 U. FLA. L. REV. 12, 64 (1949), which states:

Since the Supreme Court of Florida has committed itself to the principle that the homestead provisions apply to any interest that the head of a family residing in Florida may have in a dwelling, it is reasonable to infer that leasehold interests for less than one year may be subject to the homestead laws . . . .

*Id.* (footnote omitted).

15. In *Wartels v. Wartels*, 357 So. 2d 708 (Fla. 1978), the supreme court held that the shareholder of a cooperative apartment who died January 2, 1975, survived by his wife, could devise his shares because they were not homestead property. *Id.* at 709. The court noted that the corporation held title to the land on which the cooperative apartment building was constructed and leased the shareholder his individual cooperative apartment unit. The court noted that the "purchaser of a cooperative apartment unit does not hold any type of proprietary interest in either the apartment itself or the apartment building containing the apartment unit, or the land upon which the building is situated." *Id.* This opinion also noted that a cooperative unit may be subject to property taxes and qualify for a homestead tax exemption. *Id.* at 710-11. However, the Florida Constitution provides that for purposes of the homestead tax exemption, legal or equitable title to real estate "may be held . . . indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years." FLA. CONST. art. VII, § 6.

A cooperative is a "form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property." FLA. STAT. § 719.103(9) (Supp. 1992). A cooperative parcel is "the shares or other evidence of *ownership* in a cooperative *representing an undivided share in the assets of the association*, together with the lease or other muniment of title or possession." *Id.* § 719.103(11) (emphasis added); *see also id.* § 719.105(1)(b). A unit is "a part of the cooperative property which is subject to exclusive use and possession" and may be "improvements, land, or land and improvements together." *Id.* § 719.103(15).

16. FLA. STAT. §§ 222.02, 222.05 (1991); *see infra* text accompanying notes 232-37.

17. *See* FLA. STAT. § 719.114 (1991) (real estate taxes assessed against individual cooperative parcels rather than cooperative property as a whole).

requirements for the homestead tax exemption differ from the requirements for the homestead creditor exemption.<sup>18</sup>

## ii. *Residency/Use Requirements and Acreage Limitations*

Third, the homestead must be the permanent place of residence of the owner or his or her family.<sup>19</sup> This requirement applies expressly to homesteads within a municipality and, by implication, to homesteads outside a municipality. The permanent residency requirement cannot be satisfied unless the owner or family member residing in the homestead is a citizen or has a permanent visa.<sup>20</sup> Once residency is established, the exemption remains until the property is abandoned.<sup>21</sup> A temporary absence from the homestead is not an abandonment.<sup>22</sup> Intent to permanently reside in the homestead, rather than physical presence is determinative.<sup>23</sup> As a result, a contract to sell does not necessarily result in an abandonment of the homestead.<sup>24</sup> There is some question whether one person who owns two homes can claim more than one homestead exemption if one is used as his

18. Compare FLA. CONST. art. VII, § 6 with *id.* art. X, § 4. The homestead tax exemption is beyond the scope of this article.

19. *Cooke v. Uransky*, 412 So. 2d 340 (Fla. 1982) (Canadian citizen or family needed permanent visa and to register as resident alien to be able to establish permanent residence in Florida).

20. See *id.*; see also *Raheb v. DiBattisto*, 513 So. 2d 717 (Fla. 3d Dist. Ct. App. 1987) (holding that foreign nationals of Iran with no permanent resident alien status in the United States could not establish homestead in Florida).

21. *Marsh v. Hartley*, 109 So. 2d 34, 38 (Fla. 2d Dist. Ct. App. 1959).

22. E.g., *Collins v. Collins*, 7 So. 2d 443 (Fla. 1942) (temporary rental of homestead during tourist season was not abandonment, when owners were temporarily absent but intended to return); *United States Fidelity & Guar. Co. v. Marshall*, 4 So. 2d 337 (Fla. 1941) (homestead not abandoned even though owner and family temporarily lived in non-homestead farm during several seasons).

23. *Engel v. Engel*, 97 So. 2d 140, 142 (Fla. 2d Dist. Ct. App. 1957) (“[P]ermanency does not mean . . . that there must be an avowed and conclusive intent to forever remain in a given place of abode, eternally or even ‘until death do us part.’ The only proper concept of permanency . . . means the presence of the intention to reside at that particular place for an indefinite period of time.”).

24. *In re Estate of Skuro*, 487 So. 2d 1065 (Fla. 1986) (homestead was not abandoned when owner resided there at time of his owner’s death, even though owner had entered into a contract to sell the homestead because the sale had not been consummated at the time of his death; thus, devise of homestead was restricted because of minor children); *Brown v. Lewis*, 520 F. Supp. 1114 (M.D. Fla. 1981); *Beensen v. Burgess*, 218 So. 2d 517 (Fla. 4th Dist. Ct. App. 1969). For a discussion of these two cases, see *infra* text accompanying notes 283-84.

or her personal residence and another is used as the residence of his or her family.<sup>25</sup>

The exemption can extend to up to one-half an acre within a municipality (an urban homestead) and up to 160 acres in unincorporated areas (a rural homestead). The acreage must be contiguous to the acreage containing the residence.<sup>26</sup> The urban homestead is limited to residential use; it does not extend to a business home. The urban homestead can be used for a residence as well as a farm, or business, or for other purposes,<sup>27</sup> so long as the acreage is contiguous to the residence. Once a rural homestead has been established it will not be subject to the more restrictive urban acreage limitations if the property thereafter is incorporated into a municipality unless the owner consents.<sup>28</sup> In addition, a homestead owner can purchase additional acreage contiguous to the homestead of up to the maximum acreage and exempt it from existing judgments against the owner.<sup>29</sup>

### *b. Scope of Exemption and Exceptions*

The scope of the exemption is extensive. The homestead is exempt from liens and forced sale, with several exceptions provided by the Florida Constitution and the judiciary as well as by federal law. Article X, section 4(a) of the Florida Constitution provides:

There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for

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25. See Donna Litman Seiden, *An Update on the Legal Chameleon: Florida's Homestead Exemption and Restrictions*, 40 U. FLA. L. REV. 919, 930-31 (1988). The constitution exempts a homestead that is either the owner's residence or his or her family's residence.

26. Acreage is considered contiguous even if various parcels are separated by streets or easements.

27. *Armour & Co. v. Hulvey*, 74 So. 212 (Fla. 1917) (rural homestead not limited to residence, subsidiary building, and business house—six acres of land, including buildings and property used as preparatory school for students and cadets was exempt homestead). The rural homestead may include growing crops. See *Adams v. Adams*, 28 So. 2d 254 (Fla. 1946) (relating to devise and descent of homestead). But see *Gentile Bros., Inc. v. Bryan*, 133 So. 630 (Fla. 1931) (relating to mortgage on citrus crops).

28. Similarly, once a homestead qualifies as a rural homestead, it will not be limited by the urban use restrictions, unless the land is incorporated into a municipality and the owner consents to the reduction.

29. See *Quigley v. Kennedy & Ely Ins., Inc.*, 207 So. 2d 431, 433 (Fla.), *cert. denied*, 210 So. 2d 869 (Fla. 1968).

the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person. . . .

The homestead is protected from most debts because they cannot become liens upon the property. In addition, the homestead is protected from forced sale through foreclosure of a lien or other court process, except for certain liens and obligations. If the owner voluntarily sells the homestead, the net proceeds from the sale will retain their exempt status so long as the seller intends to reinvest the proceeds in another homestead within a reasonable time, keeps the funds separate, and actually reinvests them.<sup>30</sup> The same rule applies to insurance proceeds from a casualty, such as fire damage to the homestead, or proceeds from an involuntary conver-

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30. *Orange Brevard Plumbing & Heating 'Co. v. LaCroix*, 137 So. 2d 201, 205-06 (Fla. 1962). In *LaCroix*, the court held that proceeds of a voluntary sale of a homestead are exempt

if and only if, the vendor shows, by a preponderance of the evidence an abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time. Moreover, only so much of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus over and above that amount should be treated as general assets of the debtor. We further hold that in order to satisfy the requirements of the exemption the funds must not be commingled with other monies of the vendor but must be kept separate and apart and held for the sole purpose of acquiring another home. The proceeds of the sale are not exempt if they are not reinvested in another homestead in a reasonable time or if they are held for the general purposes of the vendor.

*Id.* at 206. See also *In re McDonald*, 100 B.R. 598 (Bankr. S.D. Fla. 1989) (portion of proceeds from sale of first home that were not reinvested in purchase of less expensive second home were not exempt, even though seller separately invested them, for the one year period after the sale, because court found facts did not support seller's contention that the second home was temporary purchase until he could find more expensive home in future); *McGuire v. Manufactures & Traders Trust Co.*, 37 B.R. 365 (Bankr. M.D. Fla. 1984) (debtor, through his widow, was unable to prove any intent on the part of the debtor to purchase or build a new residence to replace the sale of the old residence, nor was she able to prove the proceeds were segregated for this purpose); *Havee v. Rodriguez*, 24 B.R. 12 (Bankr. S.D. Fla. 1982) (proceeds from sale of first home so commingled with income and funds from corporate loans that purchase of some home not treated as made from exempt proceeds from first home; therefore, second home not continuation of first homestead); *Sun First Nat'l Bank v. Gieger*, 402 So. 2d 428 (Fla. 5th Dist. Ct. App. 1981) (purchase money mortgage received by seller from sale of homestead could qualify as exempt non-cash proceeds to extent sellers intended to reinvest new homestead proceeds).

sion of the homestead.<sup>31</sup> If the sale of a homestead is forced to satisfy a valid lien, the excess proceeds would be exempt;<sup>32</sup> however, if the proceeds are not reinvested within a reasonable time they should lose their exempt status by analogy to the rule for a voluntary sale.

Some creditors have priority over the exemption. These creditors have liens or claims that are superior to the exemption. In some cases the express provisions of the Florida Constitution create the priority. In other cases, the superior nature of the claim or lien is a product of judicial doctrine, a Florida court's equitable powers, or federal law.

The homestead is not exempt from a lien for an obligation contracted to purchase, improve, or repair it.<sup>33</sup> If a buyer wants to retain the full benefit of the exemption, the buyer must pay the seller the full purchase price for his or her homestead. Otherwise, the seller can force the sale of the homestead.<sup>34</sup> Similarly, the owner must pay for the costs he or she incurs to repair the homestead or to add to or improve it. The owner also must pay for labor provided to the home and yard or field.<sup>35</sup> Construction costs, including labor and materials, may be supported by a construction lien,<sup>36</sup> or in some cases, an equitable lien, on the homestead.<sup>37</sup>

31. See *Kohn v. Coats*, 138 So. 760 (Fla. 1931) (insurance proceeds for homestead destroyed by fire were exempt); see also *Hill v. First Nat'l Bank*, 84 So. 190 (Fla. 1920) (amounts recovered as damages resulting from unlawful levy and sale of exempt homestead were exempt).

32. *Scull v. Beatty*, 9 So. 4 (Fla. 1891) (excess proceeds from foreclosure of mortgage homestead after owner's death were payable to decedent's children and were exempt from decedent's creditors).

33. *Platt v. Platt*, 39 So. 536 (Fla. 1905) (holding that one partner's agreement to assume the payment of certain partnership indebtedness when he purchased the homestead property was an obligation contracted for the purchase of the homestead).

34. See *Arko Enters., Inc. v. Wood*, 185 So. 2d 734 (Fla. 1st Dist. Ct. App. 1966) (seller had vendor's lien for purchase price under contract to sell).

35. Although an urban homestead can include a farm, the homestead may be protected against debts incurred in connection with that farm, unless those debts fit within one of the exceptions, such as for "house, field or other labor." *Lamb v. Ralston Purina Co.*, 21 So. 2d 127, 132 (Fla. 1945) (homestead owned by wife was small farm where she resided and engaged in business of raising and selling poultry and eggs could not be liened to for debt for chicken feed and insecticide because bill for feed and insecticide was not "'for house, field or other labor.'").

36. FLA. STAT. §§ 713.001-713.37 (1991 & Supp. 1992); see also *Wood v. Wilson*, 84 So. 2d 32 (Fla. 1955) ("absent special or peculiar equities justifying the imposition of an equitable lien as typified by the case of *Jones v. Carpenter*, [106 So. 127 (Fla. 1925)] an action to enforce a materialman's or mechanic's lien must be brought within the period of limitation stipulated in the applicable statute.").



Further, the homestead is not exempt from a lien for taxes or assessments on the homestead. Accordingly, the owner must pay the property taxes assessed against the homestead by the county or other state municipality to protect his or her homestead. This includes assessments, such as special assessments for roads or other improvements that benefit the home and the neighborhood in which the homestead is located.

A Florida homestead is not exempt from a federal tax lien.<sup>38</sup> Thus, the owner must pay his or her federal tax liability; otherwise, the federal government can obtain a tax lien against the homestead. Although a lien can attach to a homestead for a federal estate tax, Florida law places the burden of paying the federal estate tax on beneficiaries other than persons receiving an interest in the homestead.<sup>39</sup>

The owner can mortgage his or her homestead, provided that if the owner is married, the spouse joins in the mortgage.<sup>40</sup> If the owner defaults on a valid mortgage, the mortgage holder can force the sale of the homestead. Thus, a creditor can protect itself when extending credit to a homestead owner by obtaining a valid consensual lien on the homestead, before extending credit.<sup>41</sup>

37. Florida Statutes section 713.30 provides that "nothing contained in part I of this chapter [chapter 713—Construction Lien Law] shall be construed to prevent any lienor or assignee under any contract from maintaining an action thereon at law in like manner as if he had no lien for the security of his debt." FLA. STAT. § 713.30 (1991) (emphasis added). See also *Wood v. Wilson*, 84 So. 2d 32 (Fla. 1955) and ch. 17097-326, § 32, 1935 Fla. Laws 718, 744, which contained comparable language to that quoted from Florida Statutes section 731.30 (1991).

38. See *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert denied*, 372 U.S. 913 (1963) (homestead subject to tax liens for owner's liability for federal income taxes); see also *United States v. Rodgers*, 461 U.S. 677 (1983) (regarding federal liens against Texas homestead).

39. FLA. STAT. § 733.817(1)(d) (Supp. 1992); see also *Smith v. Unkefer*, 515 So. 2d 757 (Fla. 2d Dist. Ct. App. 1987) (court apportioned tax on property in which decedent retained life estate as his homestead, because remainder interest was transferred by *inter vivos* deed and life estate that qualified for exemption terminated on decedent's death).

40. A spouse must join in the mortgage; however in some cases, the spouse may be estopped from contesting the validity of joinder. See *New York Life Ins. v. Oates*, 192 So. 637 (Fla. 1939) (deciding when law required mortgage to be duly executed). To assure proper joinder, the mortgagee should see the spouse execute the mortgage. *Palm Beach Sav. & Loan Ass'n v. Fishbein*, 619 So. 2d 267 (Fla. 1993) (wife's failure to join in mortgage rendered mortgage invalid, and bank did not have right to rely on wife's signature, forged by husband). Under present law, a mortgage does not require two witnesses. *Moxley v. Wickes Corp.*, 356 So. 2d 785 (Fla. 1978).

41. A waiver of the exemption in a note is not enforceable; a valid mortgage is required. *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956).

A homestead is not exempt from pre-existing liens.<sup>42</sup> A lien can attach to property before it attains its homestead status.<sup>43</sup> When the owner qualifies for the exemption, that pre-existing lien has priority over the exemption.<sup>44</sup> In some cases, the owner can avoid that lien in a bankruptcy proceeding.<sup>45</sup> By contrast, if a person acquires homestead property when he or she is subject to a judgment, the homestead exemption is superior so that the lien cannot attach.<sup>46</sup>

A pre-existing lien also can arise from a provision in a declaration of restrictions or declaration of condominium applicable to the property. For example, these liens may arise for nonpayment of an assessment for a recreational lease for a subdivision<sup>47</sup> or an assessment for maintenance for a condominium.

Generally, the homestead exemption is liberally construed and the exceptions are narrowly construed. Nevertheless, the exemption laws will not be interpreted or applied "to make them instruments of fraud or unjust impositions upon the rights of creditors."<sup>48</sup> Accordingly, equity will protect a creditor by granting the creditor an equitable lien upon the property, which limits the effect of the exemption.<sup>49</sup> Equitable liens are imposed under very limited circumstances. These liens are imposed when embezzled funds are used to satisfy an obligation that could create a valid

42. See, e.g., *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980); *Giddens v. McFarlan*, 10 So. 2d 807 (Fla. 1943).

43. *Lyon v. Arnold*, 46 F.2d 451 (5th Cir. 1931) (lien attached to property prior to the time it was occupied).

44. *Pasco v. Harley*, 75 So. 30 (Fla. 1917) (lien attached to property when unmarried owner was not head of family and constituted an interest in property that was not considered to be owned by him, when he married and because head of family exemption was superior to lien).

45. 11 U.S.C. § 522(f) (1988); *Owen v. Owen*, 111 S. Ct. 1833 (1991); see also *Hershey v. Linzer*, 50 B.R. 329 (Bankr. S.D. Fla. 1985) (judicial lien that attached to property in 1982 when debtor was not head of family was avoidable by debtor because it impaired his homestead exemption in 1983 when he was head of family).

46. *Quigley v. Kennedy & Ely Ins., Inc.*, 207 So. 2d 431 (Fla.), *cert. denied*, 210 So. 2d 869 (Fla. 1968) (judgment did not become lien on additional acreage acquired contiguous to existing homestead property); see also *In re Krueger*, 90 B.R. 553 (Bankr. S.D. Fla. 1988).

47. *Bessemer*, 381 So. 2d at 1348 (lien created under recreational lease for subdivision was part of affirmative covenant created when owners accepted their deed to their lot in subdivision, related back to time when declaration of restrictions were filed and attached prior to time owners acquired their homestead interest in property).

48. *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 450 (Fla. 1943).

49. *Fishbein*, 619 So. 2d at 270; see also *Sonneman v. Tuszyński*, 191 So. 18 (Fla. 1939) (court granted equitable lien on homestead for moneys advanced and for labor and services).

lien against the homestead property. For example, an equitable lien would be imposed when funds are wrongfully obtain and used to purchase or improve<sup>50</sup> the homestead, to satisfy certain tax obligations, or to pay off an existing valid mortgage.<sup>51</sup> If a person wrongfully obtained title to property, that transfer can be set aside<sup>52</sup> or a constructive trust imposed under equitable principles.<sup>53</sup> Imposition of a constructive trust deprives the

50. See *Jahn v. Purvis*, 199 So. 340 (Fla. 1940). In *Purvis*, the surviving widow with dower interest "sold" the entire property to a purchaser for valuable consideration. The "purchaser" paid the purchase price and made substantial improvements which enhanced the value of the property. *Id.* at 344. This was known to the decedent's children, the true owners, and the court imposed an equitable lien for the value of the improvements. *Id.* at 342-43. The children did not receive the purchase price and they were liable for its repayment and no lien was impressed upon the land for that amount. *Id.* See also *La Mar v. Lechliders*, 185 So. 833 (Fla. 1939) (equitable lien imposed to support agreement that Lechliders would pay for cost of addition to be added to the La Mar's homestead for Lechliders' use and that existing mortgage on homestead would be assigned to Lechliders rather than satisfied with funds from Lechliders); *Jones v. Carpenter*, 106 So. 127 (Fla. 1925) (equitable lien imposed on homestead in favor of trustee in bankruptcy for corporation, when corporate funds were used to improve homestead of president of corporation).

51. See *Fishbein*, 619 So. 2d at 270. In *Fishbein*, the court imposed an equitable lien on homestead property for moneys advanced, to the extent the loan proceeds were used to satisfy valid mortgages or taxes. *Id.* at 270-71. The husband obtained the loan by forging his wife's signature on the mortgage. *Id.* at 268. The mortgage was invalid and the lender did not receive a lien for all of the funds advanced (only approximately \$930,000 of the \$1,200,000 loan was used to satisfy three existing mortgages and taxes). *Id.* See also *In re Fischer*, 129 B.R. 285 (Bankr. M.D. Fla. 1991) (debtor's homestead was subject to equitable lien in favor of former husband for funds he contributed to prevent foreclosure of property when it was their marital home); *Craven v. Hartley*, 135 So. 899 (Fla. 1931) (equitable lien granted against homestead for funds borrowed to satisfy existing mortgage on homestead).

In *Friedman v. Luengo*, 104 B.R. 489, 491 (Bankr. S.D. Fla. 1989), the bankruptcy court imposed an equitable lien under the authority of Florida law in favor of the bankruptcy trustee for funds improperly withdrawn from corporate the account to satisfy the mortgage. See *Ryskind v. Robinson*, 302 So. 2d 427 (Fla. 4th Dist. Ct. App. 1974).

52. *Regero v. Daugherty*, 69 So. 2d 178, 181 (Fla. 1953) ("conveyance may be subject to attack by homestead beneficiaries unless it is free from fraud, deceit, undue influence or duress . . ."); see also *Reed v. Fain*, 145 So. 2d 858 (Fla. 1961) (deed to son, with retained life estate in parents, void because father lacked capacity to execute deed at time of execution of deed; in addition, adult children contested invalid creation of tenancy by entirety of homestead property; case was decided when parent could not devise homestead if survived by adult children); *Graessle v. Schultz*, 90 So. 2d 37 (Fla. 1956) (daughter from first marriage claimed that mother's transfer of homestead to mother plus second husband, as tenancy by the entirety, was obtained through false representations; however, daughter failed to meet burden of proof).

53. See *Wadlington v. Edwards*, 92 So. 2d 629 (Fla. 1957). In *Edwards*, the wife would have been entitled to a constructive trust being imposed on the homestead in the husband's

owner of equitable ownership and thus negates any exemption claim the owner otherwise might have.<sup>54</sup> The exemption cannot attach to bare legal title.

There is some question whether the courts have the latitude to craft a remedy, other than an equitable lien or a constructive trust to prevent such fraud or abuse of the exemption.<sup>55</sup> In egregious cases, bankruptcy courts have denied a claim for exemption.<sup>56</sup>

In addition, the federal Bankruptcy Code provides that certain creditors can reach exempt property, regardless of a state law exemption.<sup>57</sup> At present, these creditors are limited to those with certain claims for taxes, alimony, maintenance, or support, including child support, and certain claims for fiduciary fraud or willful injury caused by a debtor to an insured financial institution, such as a federally insured savings and loan association.<sup>58</sup>

In general, the attachment of a valid lien grants the holder the right to

name when her funds were used to purchase the homestead, and the husband took title in his name against her will and without her consent; however, she was barred by laches, having waited over 20 years after her husband's death to assert her claim. *Id.* at 631.

54. *Havee v. Rodriguez*, 24 B.R. 12 (Bankr. S.D. Fla. 1982). In *Rodriguez*, the court imposed a constructive trust on the home owned by Rodriguez in favor of a corporation, when he raised his position as director and officer to benefit himself by having the corporation transfer the home to him at the corporation's expense. *Id.* at 14. The court then imposed an equitable lien on the home in favor of debtor's successor, the bankruptcy trustee, for funds debtor contributed to corporation to purchase home. *Id.* See also *First Fin. Planning Corp. of S. Fla., Inc. v. Gherman*, 103 B.R. 326 (Bankr. S.D. Fla. 1986) (constructive trust imposed on three residences owned by debtor's wife, child and in-law where residences were purchased with funds embezzled by debtor).

55. Compare *Gepfrich v. Gepfrich*, 582 So. 2d 743 (Fla. 4th Dist. Ct. App. 1991) (court forced debtor to sell homestead in order to satisfy alimony) with *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992) (regarding no RICO forfeiture of homestead).

56. See *In re Gherman*, 101 B.R. 369 (Bankr. S.D. Fla. 1989); see also *Govaert v. Primack*, 89 B.R. 954, 958 n.5 (Fla. 1988). In the majority opinion, Chief Justice Britton stated the following:

There are holdings by both Florida and federal courts subjecting homesteads to creditors' claims. . . . After practicing 40 years with these holdings, I humbly suggest that when the conduct of the debtor so offends the sensibility of a court that it cannot accept the exemption, that court presumes an exception to the constitutional provision that is completely contrary to its plain language. Because the factual permutations are infinite and the sensibility levels of courts nearly so, I do not see the emergence of a definitive rule anytime soon.

57. 11 U.S.C. § 522(c)(1), (3) (Supp. III 1991); 11 U.S.C. § 523(a)(1), (3), (4), (5) (1988 & Supp. III 1991).

58. 11 U.S.C. § 522(c) (Supp. III 1991).

force a sale of the homestead. In some cases, the property consists of homestead and nonhomestead interests and the asserted lien is against the nonhomestead interest. For example, the exempt homestead may be a life estate. A lien can attach to the remainder interest, and the remainder interest is subject to levy.<sup>59</sup> If the lienholder forces the sale of the remainder interest, while the life estate is possessory, the sale of that interest would be subject to the life estate. Most creditors, however, wait to force a sale until the remainder interest becomes possessory.<sup>60</sup>

Similarly, a lien can attach to an interest of a co-tenant if it does not qualify for homestead. The lienholder can force a sale of that interest;<sup>61</sup> however, a partition of the property can not be forced on the homestead interest if the owner of the homestead interest has the exclusive right to possession, unless the property can be divided in a manner that would preserve the homestead interest.<sup>62</sup>

In the case of a marital dissolution, the applicable state court can award ownership of the marital home or exclusive possession<sup>63</sup> or require its sale.<sup>64</sup> The courts exercise this power, notwithstanding the homestead exemption. In some cases, ownership is awarded based on special equities<sup>65</sup> and proceeds may be allocated as alimony.<sup>66</sup> Sometimes, the court awards one spouse a lien against the other's interest in the homestead in order to secure payment of a property settlement or other amount.<sup>67</sup>

59. *Aetna Ins. Co. v. LaGasse*, 223 So. 2d 727, 728 (Fla. 1969), *rev'g* 213 So. 2d 454 (2d Dist. Ct. App. 1968).

60. *Id.* (judgment against LaGasse attached as lien to the remainder interest she received when her father died, and lienholder levied on property after mother died). *But see* *Anemaet v. Martin-Senour Co.*, 114 So. 2d 23 (Fla. 3d Dist. Ct. App. 1959) (execution on remainder interest attempted while life tenant was alive).

61. *But see* *Daniels v. Katz*, 237 So. 2d 58 (Fla. 3d Dist. Ct. App. 1970) (holding that mortgage lien created by former husband with respect to his undivided interest was not enforceable while former wife had exclusive possession and her interest qualified as homestead and where mortgagee was attorney with knowledge of these facts).

62. *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978).

63. *McDonald v. McDonald*, 368 So. 2d 1283, 1284 (Fla. 1979) ("[t]he court has inherent authority to award exclusive possession of a jointly owned marital home to the party having custody of children . . .").

64. *Kuvin v. Kuvin*, 442 So. 2d 203 (Fla. 1983) (court affirmed order directing sale of marital home and division of proceeds, part of which was payable as alimony).

65. *See, e.g., Landay v. Landay*, 429 So. 2d 1197 (Fla. 1983) (tenancy by entirety converted to tenancy in common upon dissolution; however, wife was entitled to more than one-half because of special equity in other half).

66. *Kuvin*, 442 So. 2d at 203.

67. *See* *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

No other persons or valid creditors can obtain a lien against the homestead or force the sale of the homestead to satisfy a debt. This is true whether the debt arises out of a contract, a tort,<sup>68</sup> or any other wrongdoing. The exemption is superior to a claim for alimony or child support,<sup>69</sup> although dicta in old cases suggest otherwise.<sup>70</sup> There is one recent, questionable case where a former husband was directed to sell his home to satisfy an alimony obligation because the court would not allow him to use the homestead exemption as an instrument to defraud his former wife.<sup>71</sup> The constitutional exemption is so broad that the Florida government cannot use the Florida RICO Act to seize the owner's homestead if the homestead is used for illegal activities.<sup>72</sup> An equitable lien or Florida RICO action could result, however, if that person used illegally obtained funds to purchase the homestead.<sup>73</sup> In these instances, forfeiture under the federal RICO Act is a separate matter.

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68. *Olesky v. Nicholas*, 82 So. 2d 510 (Fla. 1955) (judgment for malicious prosecution not lien against homestead); *see Downing v. State*, 593 So. 2d 607 (Fla. 5th Dist. Ct. App. 1992) (court could not require owner of homestead to execute mortgage on homestead to secure obligation for restitution for damage caused by burning trash).

69. *See Graham v. Azar*, 204 So. 2d 193 (Fla. 1967) (\$1000 of personal property exempt from claim for child support); *see also Isaacson v. Isaacson*, 504 So. 2d 1309 (Fla. 1st Dist. Ct. App. 1987) (refusing to grant a former spouse an equitable lien for alimony arrearage in excess of \$15,000 because of absence of fraud or other egregious conduct on the part of the former husband who resided in former marital home with new wife).

70. *E.g., Anderson v. Anderson*, 44 So. 2d 652, 655 (Fla. 1950) (dicta that even if the father had been head of a family "his interest in the homestead would still have been subject to sale for the purpose of providing support money for his children.").

71. *See Gepfrich v. Gepfrich*, 582 So. 2d 743 (Fla. 4th Dist. Ct. App. 1991). *But see Butterworth v. Caggiano*, 605 So. 2d 56, 60 n.5 (Fla. 1992) (noting that "[v]irtually all of the relevant [fraud exception] cases involve situations that fell within one of the three stated exceptions to the homestead provision.").

72. *Caggiano*, 605 So. 2d at 57. In *Caggiano*, an owner's homestead was protected from forfeiture and sale under the Florida Racketeer Influenced and Corrupt Organization Act, chapter 895, Florida Statutes, even though three bookmaking incidents occurred at his home.

Forfeiture under the Federal RICO Act is a separate matter. It would appear that a person's homestead could be subject to forfeiture and forced sale under the Federal RICO Act, 18 U.S.C. §§ 1961-68 (1988) by analogy to the federal tax lien cases and 18 U.S.C. § 1963(a) (1988), which provides that a violator "shall forfeit to the United States, irrespective of any provision of state law . . ." certain interests and property. *See United States v. Martenson*, 780 F. Supp. 492 (N.D. Ill. 1991) (RICO forfeiture of Minnesota homestead); *supra* note 38 (regarding federal tax liens).

73. In *Caggiano*, the court noted that "no illicit proceeds were used to purchase, acquire, or improve Caggiano's property." *Id.* at 61 n.5.

## 2. Transfer Provisions

The transfer provisions affect transfers made during the owner's lifetime as well as upon his or her death. The *inter vivos* provisions restrict the owner's right to transfer any interest in the homestead while married. The transfer provisions also affect the owner's right to devise the homestead upon death, if married or survived by a minor child. Upon death, the exemption inures to certain persons, so that in some cases the homestead descends or is devised, exempt from the deceased owner's creditors.

### a. *Inter Vivos Alienation*

The constitution restricts a married owner's right to alienate his or her homestead. Article X, section 4(c) of the Florida Constitution provides in part:

The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may be deed transfer the title to an estate by the entirety with the spouse. If the owner of spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Thus, if the owner of a homestead is married, he or she cannot sell, give, mortgage or otherwise alienate any interest in the homestead without the spouse's consent. One exception to this rule is that the owner may convey title to the owner and his or her spouse as tenants by the entirety, without the spouse joining in the conveyance. In addition, the Legislature authorizes a conveyance from one spouse to another without the joinder of the grantee spouse; and the constitutionality of this statute has been upheld on other grounds.<sup>74</sup>

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74. Florida Statutes section 689.11(1) currently provides: "A conveyance of real estate, including homestead, made by one spouse to the other shall convey the legal title to the grantee spouse in all cases in which it would be effectual if the parties were not married, and the grantee need not execute the conveyance." See also *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976) (upholding constitutionality of Florida Statutes section 689.11 (1975), holding deed from husband as tenant by the entirety to wife was not invalid because the wife did not join but was invalid because it was not properly witnessed and husband lacked intent to convey when he executed it); see also *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980) (deed from husband to husband and wife as tenants by the entirety was valid even though wife did not join). The court in *Jameson* stated,

In our opinion the provision ['joined by the spouse'] is more logically and reasonably interpreted if the joinder requirement is applied only to the alienation

The homestead provisions do not guarantee the spouse the right to reside on the homestead while the owner is alive. The joinder requirement merely protects the future right that a surviving spouse has to receive an interest in the homestead. If the spouse survives, then the surviving spouse would be assured the right to reside in the homestead via a life estate or fee simple interest.

If the owner is married, there is some question as to whether the legal requirement for joinder can be waived if the owner's spouse has waived homestead rights in another document, such as an antenuptial agreement. The constitution does not restrict the right of a parent with a minor child to alienate homestead. The only protection a minor has occurs indirectly if the minor's parent is married and the spouse refuses to join in an alienation.

### *b. Devise Restrictions*

There are some restrictions on an owner's right to devise the homestead. These provisions affect whether the owner has the right to devise the property, or whether the homestead descends by statutory mandate. Article X, section 4(c) of the Florida Constitution provides in part:

The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child.

If the owner is survived by a minor child, the owner cannot devise the homestead.<sup>75</sup> This restriction applies whether the owner is married or not. The owner cannot devise the homestead in trust for the benefit of the

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clause. In our view, a requirement of spousal joinder when that spouse is the grantee was not intended by the constitutional drafters, and is neither rational nor necessary to protect the homestead heirs.

*Id.* at 354. Another theory that has been raised for this conclusion is that when "the non-owning spouse is a party to the transaction (grantee) the spouse has effectively 'joined' in the transfer by acquiescence and participation, although no formal execution was made." *Id.* at 353 (quoting *Star Project Commentary* submitted to 1978 Constitution Revision Commission).

75. This includes an afterborn or posthumous child. FLA. STAT. § 732.106 (1991); *Shone v. Bellmore*, 78 So. 605 (Fla. 1918). It also includes an adopted child. *See* FLA. STAT. § 732.108(1) (1991); *Church v. Lee*, 136 So. 242 (Fla. 1931). It also should include a child born out of wedlock when that child is considered the child of the owner under section 732.108(2). *See* FLA. STAT. § 732.108(2) (1991).



minor.<sup>76</sup>

If the owner is married but has no minor children, the owner can devise the homestead to the surviving spouse. The devise cannot be of a life estate; it must be of a fee simple interest.<sup>77</sup> The devise may be accomplished by a specific or residuary devise to the surviving spouse.<sup>78</sup> The owner cannot devise the homestead to anyone other than the surviving spouse, unless the surviving spouse has waived his or her homestead rights.<sup>79</sup>

If the owner has no spouse or minor child, the owner is free to devise the homestead to whomever he or she pleases. This is true even if the owner has adult children, who might inherit the property if he or she did not devise it.

The constitution does not provide who will receive the homestead. If the owner cannot devise the property,<sup>80</sup> does not devise it properly or can but chooses not to devise it, the Florida Probate Code determines the homestead's descent. Under the present Florida Probate Code, the following applies:

1. If there is a surviving spouse and descendants, the homestead descends, with a life estate to the spouse and the vested remainder to the descendants, per stirpes.<sup>81</sup>
2. If there is a spouse but no descendants, the homestead descends to the spouse.<sup>82</sup>
3. If there are descendants, but no spouse, the homestead descends to the owner's descendants, per stirpes.<sup>83</sup>
4. If there are no descendants and no spouse, the homestead

76. *See Beck v. Wylie*, 60 So. 2d 190 (Fla. 1952) (devise in trust for adult child was invalid when constitution prohibited devise if owner were survived by minor or adult children).

77. *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981).

78. *See Estate of Murphy*, 340 So. 2d 107 (Fla. 1976).

79. *See City Nat'l Bank v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991) ("[W]hen a decedent is survived by no minor children and the surviving spouse has waived homestead rights, there is no constitutional restriction on devising homestead property."); *Hartwell v. Blasingame*, 584 So. 2d 6 (Fla. 1991) (waiver of wife was binding on husband's children).

80. FLA. STAT. § 732.4015 (Supp. 1992).

81. FLA. STAT. § 732.401 (1991). This statute has been declared to be constitutional. The predecessor statute was declared constitutional when the existence of children, adult or minor, prohibited devise. *See* FLA. STAT. § 731.27 (1941); *see also Nesmith v. Nesmith*, 21 So. 2d 789 (Fla. 1945).

82. FLA. STAT. §§ 732.401, 732.102(a) (1991).

83. *Id.* §§ 732.401, 732.103(1), 732.104.

descends to the nearest heirs under the intestacy statute.<sup>84</sup>

If the spouse waives his or her homestead rights, the spouse is not treated as surviving,<sup>85</sup> so that the third or fourth rule applies.

The restrictions on devise do not apply to a homestead interest held as a tenant by the entirety or a joint tenant with right of survivorship.<sup>86</sup> This is because the tenant does not have any devisable interest in the homestead. When one spouse dies, the tenancy by the entirety passes to the surviving spouse by operation of law. When a joint tenant dies, the joint tenancy by right of survivorship passes to the surviving tenant or tenants. Many spouses choose to own their home in a tenancy by the entirety. This effectively avoids the surviving spouse receiving only a life estate, even if the first spouse to die is survived by a minor child. The minor child is not protected even when the surviving spouse is not the other parent of the minor child. The restrictions also do not apply to life estates or certain interests in irrevocable trusts.<sup>87</sup> The restrictions do apply to beneficial interests in a revocable trust.<sup>88</sup>

### *c. Inurement of Owner's Exemption Upon Owner's Death*

The Florida Constitution also determines who receives the owner's exemption when he or she dies. This affects whether the persons to whom the homestead is devised or descends will receive the homestead free from the claims of the deceased owner's creditors. The Florida Constitution provides that the exemption "shall inure to the surviving spouse or heirs of the owner."<sup>89</sup> A person's heirs are defined under the intestacy statutes.<sup>90</sup> The exemption inures to the heirs, even if they were not dependent on the

84. *Id.* § 732.103.

85. *Tescher*, 578 So. 2d at 703.

86. FLA. STAT. § 732.401(2) (1991).

87. *See infra* note 141 and accompanying text.

88. *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th Dist. Ct. App. 1981); *Johns v. Bowden*, 66 So. 155, 159 (Fla. 1914) (grantor retained life estate in trust and power to direct trustee to convey homestead during life; court held trust provision was "in the nature of a testamentary disposition . . . forbidden by law when the testator leaves a wife or a child"). Section 732.4015 of the Florida Statutes, has been amended to allow the grantor of a revocable trust to dispose of his or her equitable interest in homestead to his or her spouse, through a disposition in the trust, if there are no minor children. *See* FLA. STAT. § 732.4015 (Supp. 1992). The constitutionality of this statute has not been tested.

89. FLA. CONST. art. X, § 4(b).

90. *Public Health Trust v. Lopez*, 531 So. 2d 946, 951 n.6 (Fla. 1988).

homestead owner.<sup>91</sup>

The exemption does not necessarily inure to the benefit of the same persons who receive the homestead. If it does, inurement of the exemption is significant. If the same persons do not receive both, the inurement of the exemption is meaningless.

The owner's exemption and the homestead may converge in the same persons under the following circumstances:

1. If the owner is married and has no children or other descendants and the surviving spouse has not waived his or her homestead rights, then the surviving spouse will receive the homestead and the exemption.<sup>92</sup>

2. If the owner is married and has only adult children and the surviving spouse has not waived his or her homestead rights, either the surviving spouse will receive the entire homestead by devise or will receive a life estate, with all of the owner's descendants, per stirpes, receiving vested remainder interests. The exemption will inure to the benefit of the surviving spouse and the descendants.

3. If the owner is not married, but is survived by at least one minor child, all of the owner's descendants, per stirpes, will receive the homestead and the exemption. If the owner is married, but the surviving spouse waived his or her homestead rights, the same result will occur.

4. If the owner is not married (or is married but the surviving spouse waived his or her homestead rights) and has no minor children, the following applies:

- a. If the property is devised to the owner's living children, with grandchildren or other descendants receiving an interest only if his or her parent predeceased the owner, the exemption will inure to those devisees, because they qualify as heirs.<sup>93</sup>

91. *Id.* at 949.

92. The spouse will receive the homestead by devise or descent. If the homestead is owned as tenancy by the entirety, the spouse receives the property free and clear of the other's creditors (other than those creditors with valid liens) because the property is entirety property.

93. *HCA Gulf Coast Hosp. v. Estate of Downing*, 594 So. 2d 774, 776 (Fla. 1st Dist. Ct. App. 1991) ("[t]he benefit of the homestead forced sale exemption inures to a spendthrift beneficiary who would be otherwise entitled to claim homestead protection had title passed directly to her by devise or intestacy."); *Bartelt v. Bartelt*, 579 So. 2d 282, 283 (Fla. 3d Dist. Ct. App. 1991) (footnote omitted) ("[w]hen the decedent's homestead is devised to his son—a member of the class of persons who are the decedent's 'heirs'—the constitutional

b. If the property is devised to other individuals who would not be heirs, they will receive the homestead, but not the exemption. This means that before the non-heirs receive the homestead, it should be subject to administration (and claims of creditors) in the hands of the decedent's personal representative.<sup>94</sup> A post-death sale by the heirs will not subject the proceeds to claims of creditors of the decedent.<sup>95</sup> A sale directed by the will with a devise of the proceeds may.<sup>96</sup>

## B. *History of Present Homestead Exemption Law*

The exemption is over 200 years old. The first constitution for the State of Florida, the Florida Constitution of 1868, provided the basic framework for the present exemption. Some of the exemption components and the transfer provisions were amended in 1885,<sup>97</sup> 1968, 1972 and 1984. The 1968 revision was effective January 7, 1969, the 1972 amendment January 2, 1973, and the 1984 amendment January 8, 1985. The appendix contained the complete text of the respective homestead exemption provisions in the Florida Constitutions of 1868, 1885, and 1968, as well as the 1972 and 1984 amendments. The additions and changes in each subsequent text are underlined. An historical summary of these changes with respect to the exemption components (the qualification requirements

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exemption from forced sale by the decedent's creditors found in Article X, Section 4(b) of the Florida Constitution, inures to that son."'). *But see In re Estate of Hill*, 552 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1989) (exemption does not inure to devisees—life estate in homestead was devised to stepdaughter, with proceeds upon sale distributed to stepdaughter and son).

94. *But see* Fla. Stat. § 733.608 (1991) (providing that: "All real and personal property of the decedent, *except the homestead* . . . shall be assets in the hands of the personal representative: (1) For the payment of devises, debts, family allowance, estate and inheritance taxes, claims, charges, and expenses of administration.") (emphasis added).

95. *Adams v. Clark*, 37 So. 734 (Fla. 1904); *see also Tudhope v. Rudkin*, 595 So. 2d 312 (Fla. 2d Dist. Ct. App. 1992) (sale of homestead by guardian of decedent's minor children was made after homestead descended to them and exemption from decedent's creditors inured to them, so that decedent's creditors could not reach proceeds in hands of guardian).

96. *See Estate of Price v. West Fla. Hosp., Inc.*, 513 So. 2d 767 (Fla. 1st Dist. Ct. App. 1987) (direction in will to sell home and divide proceeds between adult children was treated as devise of non-exempt proceeds, so that proceeds were subject to claims of creditors). Some also argue that if there is no spouse or minor child, a direction in the will to pay expenses from the residuary may result in a residuary devise of the homestead being subject to claims, even if the homestead is devised to an heir to whom the exemption inures.

97. For an extensive discussion of the homestead issues under the 1885 Constitution through 1949, *see Crosby & Miller, supra* note 14.

and limitations and the scope of the exemption, including exceptions) and the transfer provisions (*inter vivos*, devise and survival of the exemption) follows.

## 1. Exemption Provisions

### a. Qualification Requirements and Limitations

#### i. Florida Constitution of 1868

The Florida Constitution of 1868 established the homestead exemption with restrictive ownership and residency requirements. The exemption also was subject to acreage limitations substantially similar to the present law. Only the *head of a family* residing in Florida could qualify for the exemption, if he or she owned an interest in an estate in land. The homestead must have been the *owner's* permanent residence.

The owner could be the head of a family at law or a family in fact.<sup>98</sup> The homestead included any improvements on the real estate of up to 160 acres in an unincorporated town or city or up to one-half an acre within an incorporated town or city. The rural homestead was required, by interpretation, to be the owner's permanent residence, although there was no restriction on the use of the other acreage. The urban homestead in a town or city was limited to the residence and *business house* of the owner. The exemption was not limited by a dollar amount.

The provisions for up to 160 acres paralleled the federal homestead law, under which a head of a family could purchase 160 acres of land for a nominal fee, if they settled and cultivated the land and lived on it for five years. The federal homestead law protected the owner from pre-existing debts; whereas the Florida Constitution could exempt debts incurred before or after the homestead was acquired.

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98. *Holden v. Gardner*, 420 So. 2d 1082 (Fla. 1982). In *Holden*, the court stated: In determining whether a person is the head of a family, Florida courts have long used a test which requires a showing of either: (1) a legal duty to support which arises out of a family relationship, or (2) continuing communal living by at least two individuals under such circumstances that one is regarded as in charge. While the former requirement looks to a "family in law," the latter looks to a "family in fact," which arises out of a moral obligation to support. *Id.* at 1083 (citations omitted).

## ii. *Florida Constitution of 1885*

In 1885, the qualification requirements were amended in one aspect. The constitution provided that the acreage requirement applicable to a homestead could not be reduced if the homestead was subsequently included within the limits of an incorporated city or town, unless the owner consented. Thus, once a homestead qualified for the exemption of up to 160 acres, it could not then be reduced to only one-half an acre or to only the residence and business home of the owner without the owner's consent.

## iii. *Florida Constitution of 1968*

In 1968, the qualification requirements were amended with respect to the residency requirement and the urban use restriction. In addition, an acreage contiguity requirement was affirmatively stated in the constitution and the acreage nomenclature was changed from incorporated cities and towns to municipalities.

After the 1968 revision, a person still needed to be the head of a family in order to qualify for the exemption. The residency requirement for the urban homestead was expanded in part and reduced in part. The urban homestead could extend to the residency of the owner *or his or her family*, but no longer could include a business house. Thus, the head of a family who did not reside in Florida could own a homestead in Florida, if it were the residence of his or her family. Similarly, the head of a family residing in Florida with his or her family could establish a homestead. The courts had held that there could be only one head of one family, so that it was generally understood that one family could have only one homestead.<sup>99</sup>

The residency requirement for the rural homestead was not stated but was inferred. The constitution limits the urban homestead to "the residence of the owner or his family;"<sup>100</sup> the implication being that the urban homestead includes, but is not limited to, that residence. In addition, residency is considered to be an inherent component of the term "homestead," which is used but not defined in the constitution.

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99. There were no reported cases under which one person claimed to own two homes and to be the head of two different families, one residing in each home. See *First Fin. Planning Corp. of S. Fla., Inc. v. Gherman*, 103 B.R. 326 (Bankr. S.D. Fla. 1989) (although constructive trusts were imposed on three residences owned by wife or child or in-law of debtor, exemption would not have been granted to debtor, because funds used to purchase all three homesteads were embezzled); *In re Gherman*, 101 B.R. 369 (Bankr. S.D. Fla. 1989) (debtor's exemption for life estate denied).

100. FLA. CONST. art. X, § 4(a)(1) (amended 1984).

In 1968, the constitution also was amended to provide that the rural homestead applied to up to 160 acres of “contiguous land and improvements thereon” and the urban homestead was limited to one-half acre of “contiguous land.”<sup>101</sup> Prior to 1968, there were some questions as to whether the acreage always had to be contiguous to qualify for the homestead exemption.<sup>102</sup> The 1968 revision also reflected the changes in terminology from incorporated cities and towns to municipalities; however, the same acreage limitations were retained.<sup>103</sup>

#### iv. 1984 Amendment to Florida Constitution of 1968

In 1984, the ownership requirement was significantly expanded. This amendment deleted the head of the family requirement. The ownership requirement was changed so that any “natural person” owning a homestead could qualify for the exemption.<sup>104</sup> This change expanded the exemption to single or married persons who do not head a family. Thus, a person who owns a home and resides there with his or her family can qualify for the exemption, even if he or she is not the head of the family. In addition, a person who is not married and has no family is entitled to the exemption for his or her residence.

#### b. Scope of Exemption and Exceptions

##### i. Florida Constitution of 1868

The Florida Constitution of 1868 contained some of the basic framework of the present scope of the exemption. It contained the exemption from forced sale, with some of the present exceptions. The original 1868 homestead provisions exempted the homestead “from forced sale under any *process of law*.”<sup>105</sup> It did not provide protection from lien attachment, but it did prevent forced sale by reason of such liens.

Some of the present exceptions were contained in the 1868 homestead

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101. *Id.*

102. *Clark v. Cox*, 85 So. 173, 174 (1920) (“the question whether actual contiguity is required must be determined in each case on its peculiar facts.”). In *Cox*, the conveyance of a 100-foot strip across the homestead for use as a public railroad right of way did not deprive land on both sides of easement from constituting homestead. *Id.*

103. FLA. CONST. art. X, § 4(a)(1) (amended 1984).

104. *Id.*

105. FLA. CONST. of 1868, art. IX, § 1.

provisions.<sup>106</sup> The homestead was exempt from forced sale for taxes. It was exempt from the payment of obligations contracted for the purchase of the homestead or for the erection of improvements thereon. It also was exempt for house, field, or other labor performed on the homestead premises.

## ii. *Florida Constitution of 1885*

In 1885, the scope of the exemption, and the exceptions from the exemption were expanded. The exemption protected the homestead from forced sale under *process of any court*.<sup>107</sup> In addition, the exemption provided that *no judgment, decree or execution was a lien upon the exempted property*, unless the debt was specifically excepted from the exemption.<sup>108</sup>

The exceptions were expanded to include *assessments*, as well as taxes.<sup>109</sup> There was some question as to whether the homestead was exempt from liens for any other state, county or municipal tax liability that did not relate to the homestead. Further, the homestead was not exempt from forced sale for obligations contracted to erect or *repair* improvements on the real estate. Thus, the exceptions covered taxes, assessments, obligations contracted to purchase the property or erect or repair improvements, as well as for house, field, and labor. In all other respects, the homestead was protected from liens and forced sale. In 1962, the Fifth Circuit confirmed that federal tax liens also were an exception, so that a Florida homestead could be liened and a sale forced to pay a federal tax obligation.<sup>110</sup>

## iii. *Florida Constitution of 1968*

In 1968, the exceptions were revised in minor detail; otherwise, the full scope of the exemption was retained.<sup>111</sup> The homestead remained exempt

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106. *Id.*

107. See FLA. CONST. of 1885, art. X, § 1 (\$1000 personalty exemption); *West Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 212 (1918) (the court interpreted meaning of phrase “process of any court” with respect to \$1000 personalty exemption, to apply “not only to formal and technical process, but to any judicial proceedings, of law or in equity, which seek the appropriation of the property to the payment of debts.”).

108. FLA. CONST. of 1885, art. X, § 1.

109. *Id.*

110. *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962).

111. FLA. CONST. art. X, § 4(a) (amended 1984).



from forced sale under process of any court and was protected from any judgment, decree or execution becoming a lien on the homestead, except for certain superior debts. The exceptions were reorganized so that they were more parallel in construction. The exception for taxes and assessments was changed to “*taxes and assessments thereon*.”<sup>112</sup> This was significant to the extent that the exception was limited to property taxes and assessments on the homestead property and could not include other state taxes, such as state income taxes, that had no relationship to the homestead property. The last time the scope of the exemption or the exceptions were amended was in 1885.<sup>113</sup>

## 2. Transfer Provisions

The homestead transfer provisions of the homestead exemption affect a married owner's ability to transfer the homestead during the owner's lifetime. They also affect whether an owner who is married or has minor children can designate, by last will and testament, who will receive the homestead upon the owner's death. These provisions also affect whether the exemption inures to the benefit of the persons who receive the homestead upon the owner's death. The original constitutional provisions and the revisions and amendments reflect some of the changes in the rights of men and women with respect to property ownership, as well as other changes.

### a. *Inter Vivos Alienation*

#### i. *Florida Constitution of 1868*

The Florida Constitution of 1868 did not contain any restrictions on the right of the head of a family to alienate any or all of his or her interest in the homestead during the owner's lifetime.<sup>114</sup> Generally, the head of the family was the man and the wife had a dower interest in the homestead. Dower rights applied to the homestead because it was real property.

#### ii. *Florida Constitution of 1885*

In 1885, the constitution was revised to provide that the homestead did not prevent the owner from alienating his or her homestead by deed or

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112. *Id.*

113. See FLA. CONST. of 1885, art. X, § 1.

114. See FLA. CONST. of 1868, art. IX.

mortgage, provided that the owner duly executed the deed or mortgage.<sup>115</sup> In addition, if the owner were married, the owner's husband or wife was required to *duly execute* the deed or mortgage.<sup>116</sup>

### iii. *Florida Constitution of 1968*

In 1968, the *inter vivos* transfer provisions were revised.<sup>117</sup> Gifts were added to the list of permitted alienation, so that the owner could alienate his or her homestead by mortgage, sale, or gift. This eliminated any judicially imposed requirement of consideration. If the owner was married, the owner could not alienate the homestead unless the spouse joined. The requirement that an alienation be duly executed was deleted; thus, a contract to sell a homestead and a mortgage is enforceable even if it is not witnessed.<sup>118</sup> In addition, a provision was added so that an incompetent owner could alienate the homestead or an incompetent spouse could join as provided by law (whether judicial or statutory).

### b. *Devise upon Death*

#### i. *Florida Constitution of 1868*

The Florida Constitution of 1868 contained no reference to the owner's right to dispose of the homestead by will, or any restrictions on that right.<sup>119</sup> The courts inferred from the text of the constitution that the homestead descended to the owner's heirs and could not be devised.<sup>120</sup>

115. A deed or mortgage was duly executed if it was executed in accordance with statutes requiring deeds and mortgages to be executed. *Oates v. New York Life Ins. Co.*, 152 So. 671 (Fla. 1934). At that time, due execution by a married couple required a mortgage to be signed by husband and wife under seal, in the presence of two witnesses, to be acknowledged by the wife that she executed the mortgage freely and voluntarily, to contain a certificate of the officer, and for delivery to occur. *Id.* at 673. See *Abercrombie v. Eidschun*, 66 So. 2d 875 (Fla. 1953) (contract to sell homestead required due execution—two witnesses); see also *Crosby & Miller*, *supra* note 14, at 63.

116. See *supra* note 115.

117. FLA. CONST. art. X, § 4(c) (amended 1972).

118. *Moxley v. Wickes Corp.*, 356 So. 2d 785 (Fla. 1985) (relating to mortgage); *Rosenthal v. Finger & Margolis, P.A.*, 460 So. 2d 993 (Fla. 4th Dist. Ct. App. 1984) (relating to contract to sell).

119. FLA. CONST. of 1868, art. IX.

120. *Wilson v. Fridenburg*, 19 Fla. 461 (1882) (holding that a husband could not devise homestead because devise would be incompatible with the constitutional provision accruing the exemption to his heirs).

Further, if the owner was a married man, his wife was protected by dower.<sup>121</sup>

## ii. *Florida Constitution of 1885*

In 1885, the Florida Constitution was revised to provide that nothing in the homestead provisions prevented the head of a family from disposing of his or her homestead by will if the "holder be without children."<sup>122</sup> By implication, when the holder had children, he or she was prohibited from disposing of his or her homestead by will.<sup>123</sup> If there were a child or children, the homestead descended to his or her heirs, subject to a claim of dower if survived by a wife. If there were no children, the owner could devise the homestead; but if the owner were a married man, that devise would be subject to the widow's right to dower.<sup>124</sup> In 1899, a statute was enacted prohibiting the head of the family who was survived by a wife from devising the homestead.<sup>125</sup> The wife was entitled to dower or a child's share.<sup>126</sup> By contrast, if the wife was the head of the family, she could devise it if she chose and could disinherit her husband from receiving the homestead.

In 1933, the descent provisions were changed when the head of the family was survived by a widow and lineal descendants. In that case, the wife received a life estate and the descendants the vested remainder.<sup>127</sup> Dower no longer applied to homestead, except for preexisting dower rights.<sup>128</sup> If the wife was the head of the family, her husband was not entitled to a life estate; instead he was entitled to a child's share.<sup>129</sup> Further, if there were no descendants, a wife/head of the family could disinherit her husband from the homestead, but a husband/head of the family could not disinherit his wife. The courts never decided whether this violated the United States Constitution or the Florida Constitution.

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121. *Id.* at 467.

122. FLA. CONST. of 1885, art. X, § 4.

123. *Palmer v. Palmer*, 35 So. 983 (Fla. 1904).

124. *Purnell v. Reed*, 13 So. 874, 876 (Fla. 1893).

125. Ch. 4730-69, § 1, 1899 Fla. Laws 119, 119-20; *see also* FLA. STAT. § 731.05 (1933) (regarding the prohibition on devise).

126. GENERAL STATUTES OF STATE OF FLORIDA, Devolution by Dower, ch. 3, § 2308 (1872).

127. FLA. STAT. § 731.05 (1931).

128. FLA. STAT. § 731.34 (1933).

129. *Id.* § 731.23(1).

### iii. *Florida Constitution of 1968*

In 1968, the constitution affirmatively prohibited devise in certain circumstances.<sup>130</sup> The constitution provided that the homestead could not be devised if the owner were survived by a spouse or minor child. This represented two substantial departures from the prior law. First, surviving husbands and wives were both protected. Thus, if the wife were the head of the family, she could not devise her homestead if her husband survived her.

Second, only the existence of minor children prohibited the head of a family from devising the homestead. If the family head was survived by children, all of whom were adults, but no spouse, the owner could devise the homestead freely, even if those children comprised the family of which the owner was the head.

Although the constitution was revised in 1968, the Florida probate law continued to prohibit devise if the head of the family was survived by any lineal descendant, whether or not a minor.<sup>131</sup> In 1971, this statute was declared unconstitutional to the extent it prohibited devise when the owner was survived by an adult child, but not a spouse or a minor child.<sup>132</sup>

The constitutional distinction between a surviving minor child and an adult child creates an unusual aspect to the prohibition on devise, because minority is a temporary condition. Further, the constitution does not guarantee the minor the right to reside in the homestead. The existence of a minor prohibits devise,<sup>133</sup> but the Florida Probate Code does not necessarily provide the minor with a residence during his or her minority. If the owner is survived by a spouse and a minor child, the surviving spouse receives a life estate in the homestead.<sup>134</sup> If that spouse is also the minor's parent or guardian, the minor child can reside with the surviving spouse. Otherwise, the minor will reside with his or her surviving parent or guardian. If there is no surviving spouse, the minor child will receive a present, possessory interest in the homestead. If there are other surviving children or descendants, the minor child must share ownership with the other children and descendants. Thus, if there are other children, the minor is not provided exclusive possession of the homestead. Further, the minor will reside there only if his or her surviving parent can live there too.

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130. FLA. CONST. art. X, § 4(c).

131. FLA. STAT. § 731.05(1) (1931).

132. *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971).

133. FLA. CONST. art. X, § 4(c).

134. FLA. STAT. § 732.401 (1991).

## iv. 1972 Amendment to Florida Constitution of 1968

In 1972, the Florida Constitution of 1968 was amended to allow the owner to devise to his or her spouse if there was no minor child.<sup>135</sup> This devise may be accomplished by a specific devise or a residuary devise to the spouse;<sup>136</sup> however, the devise must be of a fee interest.<sup>137</sup> Clearly, a specific devise of the owner's entire interest to the surviving spouse will be effective if there are no minor children, even if the owner only owns an undivided one-half interest.<sup>138</sup> It is questionable whether a devise to the spouse of an undivided one-half interest in the homestead will qualify if the owner is the sole owner of the entire property.<sup>139</sup>

The restriction on devise applies if the homestead is owned by a revocable trust created by the owner.<sup>140</sup> The restriction should not apply to the beneficial interest owned by a beneficiary of an irrevocable trust, even if the beneficiary was the settlor of the trust, so long as the transfer into the trust was a valid inter vivos transfer and the beneficiary had no power to

135. FLA. CONST. art. X, § 4(c).

136. Estate of Murphy, 340 So. 2d 107 (Fla. 1976).

137. *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981).

138. See *In re Estate of Donovan v. Hendrickson*, 550 So. 2d 37 (Fla. 2d Dist. Ct. App. 1989) (devise to wife of decedent's entire undivided one-half interest as a tenant in common was valid—devise was through residuary clause and revocable trust).

139. In *In re Estate of Ritz v. Ritz*, 385 So. 2d 1102 (Fla. 5th Dist. Ct. App. 1980), the court approved a devise of homestead by a husband of a life estate in his homestead to his wife and a power to sell. The wife was entitled to 80% of the proceeds upon sale during her life or upon her death. The other 20% of the proceeds was payable to two sons of his. The supreme court overruled *Ritz* in *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981).

In two cases after *Finch*, the district court of appeal ruled that the devise to the surviving spouse and another as tenants in common was invalid in its entirety, so that the wife received a life estate and the remainder vested in the lineal descendants, per stirpes. *Jewett v. Sun Bank*, 509 So. 2d 1256 (Fla. 2d Dist. Ct. App. 1987) (devise to wife and adult son); *Iandoli v. Iandoli*, 504 So. 2d 426 (Fla. 4th Dist. Ct. App.), *review denied*, 513 So. 2d 1061 (Fla. 1987) (devise to wife and adult daughter).

It is arguable that the devise to the spouse should qualify, even if it is less than a fee, and only the devise to the nonspouse should fail. This result is unwieldy; so that few testators would choose this option if they understood the result. For example, a devise of a one-half interest to the spouse would result in the spouse owing one-half outright and a life estate in the other half if there were lineal descendants.

140. *In re Estate of Johnson*, 397 So. 2d 970 (Fla. 4th Dist. Ct. App. 1981); *Johns v. Bowden*, 66 So. 155 (Fla. 1914); see also FLA. STAT. § 732.4015(2) (Supp. 1992) (defining a devise to include "a disposition by trust of that portion of the trust estate which, if titled in the name of the settlor of the trust, would be the settlor's homestead.").

dispose of the homestead interest upon his or her death.<sup>141</sup>

The devise restrictions do not apply if the homestead is owned by both spouses, as tenants by the entirety, even if there is a minor child.<sup>142</sup> It also does not apply if the homestead is co-owned with another as joint tenants with right of survivorship and the joint tenancy was created before the owner married or had a child.<sup>143</sup> Similarly, the restrictions do not apply to a life estate. If the homestead is co-owned as tenants in common, the restrictions on devise apply to each owner's undivided interest.

In addition, if the spouse waives his or her homestead rights, the owner is not treated as survived by a spouse. Thus, the owner can devise the homestead to any one he or she chooses, so long as the owner is not survived by a minor child.

### *c. Inurement of Exemption*

#### *i. Florida Constitution of 1868*

The Florida Constitution of 1868 contained some of the basic framework of the provisions for the survival of the exemption. The first constitution provided that the exemption from forced sale for the owner's debts would "accrue to the heirs of the party having enjoyed or taken the benefit of such exemption."<sup>144</sup> Under the laws of descent, the homestead would descend to the owner's heirs. The owner's exemption also would accrue to those heirs. Thus, the heirs received the homestead free of any threat of a forced sale. However, this did not mean that the heirs could continue to own the homestead free from the reach of their own creditors. An heir would be entitled to his or her own homestead exemption only if that heir was the head of the family residing in Florida and the property became that heir's residence.

#### *ii. Florida Constitution of 1885*

In 1885, the constitution expanded the group that could benefit from the owner's exemption. The constitution was revised so that the exemption would "inure" to the surviving widow and heirs of the party entitled to the

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141. The retention of other rights by the grantor/beneficiary of an irrevocable trust may be treated comparable to outright ownership in certain cases, so as to preclude disinheritance of a surviving spouse or minor child.

142. See *Wilson v. Florida Nat'l Bank & Trust Co.*, 64 So. 2d 309 (Fla. 1953).

143. See *Ostyn v. Olympic*, 455 So. 2d 1137 (Fla. 2d Dist. Ct. App. 1984).

144. FLA. CONST. of 1868, art. IX, § 3 (1868).

exemption.<sup>145</sup> This guaranteed the surviving widow the benefit of her husband's exemption from the reach of his creditors. In the special case where the wife was the head of the family, the exemption would not inure to her surviving husband as an heir.

### iii. *Florida Constitution of 1968*

The Florida Constitution of 1968 treats surviving husbands and wives similarly. After this revision, the exemption inures "to the surviving spouse or heirs of the owner."<sup>146</sup> It is unclear why the disjunctive "or" was used. The term "heir" is sufficient to include a surviving spouse. In addition, sometimes the homestead descends to the surviving spouse and descendants. The exemption should inure to the benefit of all of these new owners, so that the life estate and vested remainder interests can receive the benefit of the exemption from the decedent's creditors.

When the Florida Constitution was amended in 1984 to extend the exemption from the head of the family to all natural persons,<sup>147</sup> the provision regarding inurement was not changed. Nevertheless, the amendment changed the scope of the inurement provision. The effect of the amendment is that more residences can qualify as homesteads, and thus more exemptions can inure to more heirs.<sup>148</sup>

In 1968, Florida Supreme Court interpreted the term "heirs" to mean those persons who would inherit the property if the owner died intestate.<sup>149</sup> After the 1968 amendment, a parent living alone can qualify for the exemption without being the head of a family. That parent can devise the homestead to his or her adult children and they will receive the homestead property and the exemption. Thus, adult children can qualify as heirs, regardless of whether the owner has an obligation to support them or his or her adult children and they would receive the homestead and the exemption. Thus, adult children would qualify as heirs, regardless of whether the owner had an obligation to support them or was in fact supporting them.<sup>150</sup> Further, the exemption accrues even if the heirs have no intention of using the decedent's homestead as their own. This results more frequently now that

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145. FLA. CONST. of 1885, art. X, § 2.

146. FLA. CONST. art. X, § 4(b).

147. *Id.* § 4(a) (amended 1984).

148. *Id.*

149. *Public Health Trust v. Lopez*, 531 So. 2d 946, 950 n.6 (Fla. 1988).

150. This was true under the prior law also. Dependence was not a prerequisite to inurement. *See, e.g., Cumberland & Liberty Mills v. Keggin*, 190 So. 492 (Fla. 1939); *Miller v. Finegan*, 7 So. 140 (Fla. 1890).

potentially more homestead exemptions can inure to more heirs of deceased homeowners.

## II. ANALYSIS OF NEED FOR REFORM

This portion of the article will explore the need for reform with respect to the exemption provisions and the transfer provisions.

### A. *Exemption Provisions*

The constitution was amended in 1984 to expand the class of persons who could qualify for the homestead exemption to any natural person.<sup>151</sup> This expansion resolved many of the inequities arising from the outdated concepts of each family having one head and only the head of the family being entitled to the homestead exemption.

The homestead exemption is important to married couples as well as single individuals (whether divorced, widowed or never married). In some cases, it is more important to the single individual. A married couple can choose to own their property as tenants by the entirety. A tenancy by entirety property is subject only to debts for which both spouses are liable, regardless of whether it qualifies as a homestead. When the tenancy by entirety property is a homestead, the property gets added protection because it is not liable for most joint debts. The homestead is liable only for those joint debts that are superior to the exemption, such as debts relating to the purchase, repair, or improvement of the homestead or taxes thereon.

The qualification requirements and limitations of the homestead exemption will be addressed first. Particular emphasis will be given to whether the homestead exemption should be extended to cover interests that do not qualify as a present estate in land, such as cooperatives and vested remainders. Next, the scope of the exemptions and the breadth of the exceptions will then be considered, with discussion of potential areas in which the present exemption may be abused. Then, the transfer provisions will be considered, with emphasis on who should be protected by the exemption, and when and how they should be protected.

This article also will explore the appropriate method to implement such reform. In some cases, a constitutional amendment will be needed. In other cases, the solution may be implemented by statute or judicial decision, or by revision of another area of the law, such as the fraudulent transfer law.

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151. FLA. CONST. art. X, § 4(a).



Constitutional reform should be the exception rather than the rule. Constitutional provisions should bear the test of time. If the Florida homestead provisions are to be reformed, there should be a significant showing of need for reform in addition to a showing of changed circumstances or unequal or unfair treatment that merits reform. In addition, it is important to focus on the purpose of the exemption when considering reform: to assure that an owner's home is a shelter, free from the reach of his or her creditors, and that home can provide shelter for the homeowner's family during the owner's lifetime or upon his or her death.

### 1. Qualification Requirements and Limitations.

The qualification requirements of the homestead exemption relate to who can own a homestead and how it can be used, as well as what interest in land qualifies for the exemption and how much land can qualify for it. At present, there is no value limit on the exemption. First, the issue of whether there should be a value limit will be addressed. Then, the provisions relating to who can own a homestead and what residency or use restrictions apply, as well as what limitations should apply to the exemption, will be considered together. This is because the residency requirement and the acreage limitations are intertwined. Then, the issue of what types of ownership interest should qualify for the exemption will be discussed.

#### *a. Limitation on Value*

One of the calls for reform that sounds from time to time is the need for the exemption to be limited by a maximum dollar value.<sup>152</sup> The homestead exemption has not been subject to a value limit since its enactment in 1868. The fact that the exemption has been extended to single owners and other natural persons is not reason enough to impose a dollar limitation. Occasionally, a case reaches the newspapers in which a person with significant creditors purchases an expensive homestead for a price in excess of \$1,000,000 and qualifies for the exemption.<sup>153</sup> This exemption, in and of itself, does not shield that person from the reach of creditors.

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152. Crosby & Miller, *supra* note 14, at 47. This suggestion was not adopted by the Constitution Revision Commission in 1977-78. The Background Papers state that "Florida has evidenced a strong desire to protect the homestead exemption instead of the dollar value exemption granted by most states." *Background Papers, Constitution Revision Commission 1977-78*, at 3 (copy on file at the Nova Law Review office).

153. See Larry Rohter, *Rich Debtors Find Shelter in Florida*, N.Y. TIMES, July 25, 1993, § 1, at 1, 26.

If creditors' funds were wrongfully used to benefit the homestead, the creditor can reach the homestead, and in some cases, the entire exemption may be denied. If that homestead owner has other assets, those assets can be reached by the creditors unless those assets qualify for another type of exemption. If the owner sells his or her homestead, the proceeds can be reached unless the owner intends to reinvest the proceeds, segregates them, and does reinvest them in another homestead within a reasonable period of time. Thus, the creditors have other remedies. If the owner of the homestead keeps the homestead and files a petition in bankruptcy, the owner can obtain a discharge from liability to some of these creditors. In that case, it is the discharge, rather than the homestead exemption, that protects the debtor/homeowner.<sup>154</sup>

The Bankruptcy/UCC Committee of The Florida Bar conducted a limited study in 1992 to determine if there was a pattern of abuse in the use of the forty-seven different exemptions available to debtors in Florida.<sup>155</sup> One of the eight exemptions claimed most often was the homestead exemption. One-third of the 400 debtors surveyed in the Southern, Middle and Northern Districts of Florida claimed a homestead exemption. The average homestead exemption was \$40,000 in the Northern and Middle Districts combined and \$72,000 in the Southern District. The highest homestead exemption claimed was \$115,000 in the Northern and Middle Districts and \$300,000 in the Southern District. This limited survey did not reflect a pattern of abuse in claiming exemptions. If there is a pattern of abuse, one alternative would be to limit the total exemptions a debtor can claim. There would be no maximum value for the homestead exemption, but the value of the homestead exemption claimed could limit the total value of other exemptions that a debtor could claim. If this alternative is appropriate, it would be advisable to amend the constitution to authorize the Legislature to enact legislation limiting the maximum value availability of other exemptions that can be claimed, taking into account the value of the homestead exemption being claimed by that person. One exemption that Florida cannot control is the federal exemption provided to benefits in a qualified retirement covered by ERISA, such as a pension, profit-sharing, or stock bonus plan.<sup>156</sup> The amount of this exemption is not limited by

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154. See 11 U.S.C. § 524(a)(1) (Supp. 1993)

155. *A Survey of Bankruptcy Exemptions in Florida*, report of The Bankruptcy/UCC Committee of THE FLORIDA BAR, presented and approved on January 9, 1992 (copy on file at the *Nova Law Review* office).

156. See *Patterson v. Shumate*, 112 S. Ct. 2242 (1992); see also FLA. STAT. § 222.21 (1991).

ERISA, although there are built-in limitations on deductible employer contributions and benefits.

It also is noteworthy that some of these high profile debtors have been unable to claim the exemption when they used stolen funds to purchase the exemption,<sup>157</sup> when the homestead was owned by a corporation,<sup>158</sup> or when the purchase of the homestead could be avoided.<sup>159</sup>

A survey of other states may provide some insight into the issue of whether a maximum value should be imposed on the homestead exemption. There is no uniformity among the states; although, there are common patterns. Ninety percent of all of the states (forty-five of fifty states) provide a homestead exemption in a nonbankruptcy context.<sup>160</sup> In bankruptcy, a debtor in every state but Delaware can claim a homestead exemption. Some debtors in bankruptcy have the option of choosing the federal homestead bankruptcy exemption; while others are limited to the state exemption.

Fifteen states (one-third of the forty-five) provide the homestead exemption in their state constitutions.<sup>161</sup> The median exemption offered by the forty-five states in a nonbankruptcy context is \$30,000. Eight of these states provide an exemption that is limited by acreage but not value.<sup>162</sup> The other thirty-seven impose a maximum value on the exemp-

157. *In re Gherman*, 101 B.R. 369, 371 (Bankr. S.D. Fla. 1989). The court also held that Henry Gherman had "abandoned his homestead when he secretly departed Miami on August 8, 1988 with suitcases containing \$4.4 million in embezzled funds in \$100 bills, fleeing those he had swindled, and headed for a country with no extradition treaty. *Id.*

158. *In re Duque*, 33 B.R. 201 (Bankr. S.D. Ala. 1983).

159. *See Myerson & Kuhn v. Brunswick Assocs.*, 121 B.R. 145, 158 (Bankr. S.D.N.Y. 1990) (noting that Kuhn's sale of his New York home and purchase of a new home in Florida might be a fraudulent transfer); *see also In re Warner*, 90 B.R. 532, 533 (Bankr. M.D. Fla. 1988) (noting that certain transfers, such as the debtor's purchase of a 400 acre farm, the transfer of 320 of those acres to the debtor's wife or son, and the subsequent transfer of the "homestead" property to a tenancy by the entirety could be avoided if deemed fraudulent).

160. Connecticut, Delaware, New Jersey, Pennsylvania, and Rhode Island are the five states that fail to provide a homestead exemption in a nonbankruptcy context.

161. Alabama, Arkansas, Florida, Kansas, Michigan, Minnesota, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming.

162. Arkansas, Florida, Iowa, Kansas, Minnesota, Oklahoma, South Dakota, and Texas. All of these are constitutional exemptions, except for Iowa's and South Dakota's, which are statutory. Arkansas' exemption contains a \$2500 limit for 160 rural acres or one urban acre; however, the exemption is unlimited for a reduced acreage of 80 rural acres or one-quarter urban acre. Iowa's exemption is unlimited; however, it provides that if the homestead's value is less than \$500, it can be enlarged in excess of one-half city acre or 40 acres outside the

tion, ranging from a high of \$200,000 to a low of \$3500. Most of these states do not impose acreage limitations.<sup>163</sup> Nine of these thirty-seven homestead exemptions are provided by state constitution.<sup>164</sup> One problem with having a constitutional exemption with a maximum value is that it is difficult to change the value if it becomes outdated. In some cases, the constitutional limits have been raised by statute.<sup>165</sup> In two states, the constitution authorizes the exemption but does not set the limit; instead, these constitutions provide that the legislature will establish the appropriate value limitation.<sup>166</sup>

Twenty-eight other states provide a homestead exemption with a maximum value by statute. Massachusetts offers the highest exemption, \$200,000 for an owner age sixty-two or older or disabled.<sup>167</sup> Any other owner in Massachusetts is entitled to a \$100,000 exemption.<sup>168</sup> The Massachusetts homestead exemption is a statutory exemption. In 1977, the exemption was \$30,000 for a householder with a family;<sup>169</sup> in 1979, the exemption was \$50,000 for an owner with a family;<sup>170</sup> in 1989, the exemption was \$150,000 for a person age sixty-five or disabled and

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city to \$500 in value. Oklahoma's exemption contains a \$5000 limit for one urban acre if the urban homestead is used for residential and business purposes; otherwise, the exemption for an urban homestead is unlimited in value for one-quarter acre. Each of these states impose an acreage limitation on the exemption, with the maximum acreage for a rural homestead ranging from 80 to 200 acres and the maximum acreage for an urban homestead ranging from one-quarter to one acre. The limit is one-quarter acre in Arkansas and Florida; one-half acre in Iowa, Kansas and Minnesota; and one acre in South Dakota and Texas.

163. Most of the 38 states with maximum exemption values do not impose an acreage limitations in addition to the value limitation. Five states do: Louisiana, Michigan, Mississippi, Nebraska and Oregon. Most of those states use 160 acres as the rural limit (Michigan uses 40 acres). Some also use the 160 acres as a limit for an urban homestead also (Louisiana and Mississippi); others limit the urban homestead to one lot (Michigan), two lots (Nebraska), or one block (Oregon).

164. Alabama, Michigan, North Carolina, South Carolina, Tennessee, Utah, Washington, West Virginia, and Wyoming. Three of these nine states use the constitutional limits (Michigan, \$3500; Tennessee, \$5000; and West Virginia, \$5000).

165. Three states have increased the constitutional limits by statute (Alabama from \$2000 to \$5000, North Carolina from \$1000 to \$10,000, and South Carolina from \$1000 to \$5000).

166. Washington, presently \$30,000 by statute, and Wyoming, presently \$10,000 by statute.

167. MASS. GEN. LAWS ANN. ch. 188, § 1A (West 1991).

168. *Id.* § 1.

169. MASS. GEN. LAWS ANN. ch. 791, § 1 (West 1977).

170. MASS. GEN. LAWS ANN. ch. 756, § 1 (West 1979).

\$100,000 for any other owner;<sup>171</sup> and in 1991, the present limits and categories were adopted.<sup>172</sup>

Arizona's exemption is \$100,000 for all debtors.<sup>173</sup> This amount is a statutory amount enacted in 1989. Nevada's exemption also is \$95,000, enacted by statute in 1989.<sup>174</sup> North Dakota's exemption is limited to \$80,000, pursuant to a statutory exemption enacted in 1979.<sup>175</sup> In 1977, it was \$60,000.<sup>176</sup> California has an exemption that ranges from \$100,000 for persons age sixty-five, or persons age fifty-five with a low income, or for disabled persons to \$75,000 for a family home, and \$50,000 for all others.<sup>177</sup> This is a statutory exemption that was amended in 1983, 1984, 1986, 1988, and 1990. In 1983, there were two California exemption limits; \$45,000 and \$30,000.<sup>178</sup>

Other state exemptions range across the board; there are state exemptions limited to \$75,000,<sup>179</sup> \$60,000,<sup>180</sup> \$54,000,<sup>181</sup> \$50,000,<sup>182</sup> \$40,000,<sup>183</sup> \$30,000,<sup>184</sup> \$20,000,<sup>185</sup> \$15,000,<sup>186</sup> \$12,500,<sup>187</sup> \$10,000,<sup>188</sup> \$8000,<sup>189</sup> \$7500,<sup>190</sup> \$5500,<sup>191</sup> \$5000,<sup>192</sup> \$3500,<sup>193</sup> and

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171. MASS. GEN. LAWS ANN. ch. 188, § 1 (West 1989) (amended 1991).

172. MASS. GEN. LAWS ANN. ch. 188, § 1 (West 1991).

173. ARIZ. REV. STAT. ANN. § 33-1101 (1989).

174. NEV. REV. STAT. § 115.010 (1989).

175. N.D. CENT. CODE § 47-18-01 (Supp. 1991).

176. N.D. CENT. CODE § 47-18-01 (1977) (amended 1979).

177. CAL. CIV. PROC. CODE § 704.730(a) (Deering Supp. 1993).

178. CAL. CIV. PROC. CODE § 704.730(a)(1)-(2) (Deering 1983) (amended 1990).

179. MISS. CODE ANN. § 85-3-21 (1972).

180. ME. REV. STAT. ANN. tit. 14, § 4422(1)(B) (West Supp. 1992) (this limit applies if the debtor is 60 years of age or older, or is physically or mentally disabled).

181. ALASKA STAT. § 09.38.010 (Supp. 1992).

182. IDAHO CODE § 55-1003 (Supp. 1992).

183. MONT. CODE ANN. § 70-32-104(1) (1991); WIS. STAT. ANN. § 815.20 (West Supp. 1992).

184. COLO. REV. STAT. § 38-41-201 (Supp. 1992); HAW. REV. STAT. § 651-92(a)(1) (1985) (this limitation applies to the head of a family or a person 65 years of age or older); VT. STAT. ANN. tit. 27, § 101 (1989); WASH. REV. CODE ANN. § 6.13.030 (West 1993).

185. HAW. REV. STAT. § 651-92(a)(2) (1985) (for any person not a head of a family or 65 years of age or older); N.M. STAT. ANN. § 42-10-9 (Michie Supp. 1992).

186. LA. REV. STAT. ANN. § 1(A) (West 1980 & Supp. 1993); OR. REV. STAT. § 23.240(1) (1991).

187. ME. REV. STAT. ANN. tit. 14, § 4422(1)(A) (West Supp. 1992).

188. NEB. REV. STAT. § 40-101 (1988); N.Y. CIV. PRAC. L & R. 5206 (McKinney 1980 & Supp. 1993); N.C. GEN. STAT. § 1C-1601(a)(1) (1991); WYO. STAT. § 1-20-101 (1977).

189. MO. ANN. STAT. § 513.475(1) (Vernon Supp. 1992); UTAH CODE ANN. § 78-23-3(1) (1992).

\$3000.<sup>194</sup> Most of these exemptions amounts were once lower. West Virginia's homestead exemption was originally \$1000; but in 1973, the West Virginia Constitution was amended to increase it to \$5000.<sup>195</sup>

In states that allow the debtor to elect the federal bankruptcy homestead exemption, the amount exempt is \$7500; however, if the home is co-owned each owner can exempt up to \$7500.<sup>196</sup> Thus, a married couple co-owning a home can exempt up to \$15,000 of value. Each also has a \$400 wildcard so that the exemption can be increased to \$7900 or \$15,800.<sup>197</sup>

Clearly, there is no uniform amount that is considered adequate to provide a debtor with an appropriate shelter. Further, an exemption limited by a dollar amount is usually not exempt from attachment of liens. In addition, the homestead is not exempt from forced sale if the net value of the home exceeds the maximum amount. Thus, an exemption limited by a dollar amount does not protect a homeowner from losing that home to creditors. *Instead, an exemption with a maximum value provides the homeowner with the equivalent of a housing allowance.* If the net value of an owner's home exceeds the maximum amount, the sale of the home can be forced, leaving the owner with net proceeds up to the exemption amount.

To limit the Florida homestead exemption by a dollar limit would substantially change the nature of the exemption. Presently, the exemption applies to the entire homestead estate, limited only by acreage. Florida's exemption has been limited by acreage, but not value, since 1868.<sup>198</sup> The framers of the original constitution considered a debtor's right to have a

190. ILL. ANN. STAT. ch. 110, para. 12-901 (Smith-Hurd 1982); IND. CODE ANN. § 34-2-28-1 (Burns 1986 & Supp. 1992).

191. MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(5) (1989). This limitation applies to debtors in bankruptcy. *See id.* §§ 11-504(b), 11-504(f) (1989).

192. ALA. CODE § 6-10-2 (Supp. 1992); GA. CODE ANN. § 44-13-100 (Michie 1982 & Supp. 1992); KY. REV. STAT. ANN. § 427.060 (Michie/Bobbs-Merrill 1992); N.H. REV. STAT. ANN. § 480:1 (1992); OHIO REV. CODE ANN. § 2329.66(A)(1) (Anderson 1991); S.C. CODE ANN. § 41-30 (Law. Co-op Supp. 1992); TENN. CODE ANN. § 26-2-301(a) (1980); VA. CODE ANN. § 34-4 (Michie 1990); W. VA. CONST. art. VI, § 48.

193. COLO. REV. STAT. § 13-54-102(1)(o)(I) (1987) (this limitation applies to a house trailer or trailer coach); MICH. COMP. LAWS § 600.6023(1)(h) (1991).

194. MD. CODE ANN., CTS. & JUD. PROC. § 11-504(b)(5) (1989) (This limitation is used for nonbankruptcy purposes).

195. W. VA. CONST. art. VI, § 48.

196. 11 U.S.C. § 522(d)(1) (1988). The states that allow debtors to elect the federal bankruptcy homestead exemption are Connecticut, New Jersey, Pennsylvania, and Rhode Island.

197. *Id.* § 522(d)(5).

198. *See discussion supra* part I.B.1.a.i.

place to live and work so important as to protect it by constitution with no dollar limitation; whereas, the right to exempt personalty was limited to \$1000.<sup>199</sup>

Florida is not alone in allowing an exemption with an acreage limitation but no value limitation. Arkansas, Iowa, Kansas, Minnesota, Oklahoma, South Dakota, and Texas also provide exemptions with limitations on acreage but not value.<sup>200</sup>

A maximum value should not be imposed on Florida's homestead exemption. Any maximum would be arbitrary.<sup>201</sup> In 1868, the head of any family who could afford to own and maintain a home of any value he or she chose, up to the permitted acreage and uses, had the right to live there free from the reach of most creditors.<sup>202</sup> The head of the family's creditors had the burden of finding other property or sources of income from which the debt could be satisfied. In 1984, this protection was extended to any natural person.<sup>203</sup> There does not appear to be any compelling reason to change the nature of the exemption. Rather than imposing an arbitrary value limitation on the exemption, it would be more fruitful to address whether the scope of the exemption should be limited by expanding the types of debts that can become liens against a homestead and whether there are solutions available to prevent a debtor from abusing the exemption and its unlimited value.<sup>204</sup> Before addressing the scope of the exemption, it would be useful to address the residency, use, and acreage requirements and limitations as well as what types of interest should qualify for the exemption.

199. FLA. CONST. of 1868, art. IX, § 1.

200. *See supra* note 163.

201. If a maximum value is to be imposed on the exemption, one model is for the constitution to authorize the Legislature to periodically establish the appropriate maximum. The maximum could be updated, then periodically by legislation. Another alternative would be for the constitution to impose the value, with a provision that the value would be adjusted periodically by reference to a cost of living index or other index that measures changes in the property values. A final alternative would be to establish a maximum value in the constitution. Based on past experience, this alternative would be the least effective. Consider the present constitutional exemption for personalty. This exemption is for \$1000 of personal property. FLA. CONST. art. X, § 4. This is the same amount that was in the constitution in 1868. FLA. CONST. of 1868, art. IX, § 1. Presently, this exemption is so insignificant that it would cost more money than the exemption is worth to litigate an issue involving that exemption. Yet in 1868, \$1000 could shelter a significant amount of furniture and personal property contained in an exempt homestead of any value.

202. *See* FLA. CONST. of 1868, art. IX, § 1.

203. FLA. CONST. art. X, § 4.

204. *See* discussion *supra* part II.A.2.

### *b. Residency, Use and Acreage Requirements and Limitations*

The exemption, from its inception, has reflected that Florida's economy is both agrarian and urban based. It recognizes the existence of the family farm as well as the need for other families to reside and work in cities or towns. Thus, the constitution always has exempted 160 acres outside of a incorporated area or municipality and one-half an acre within.<sup>205</sup>

The original purpose of the exemption was to protect and shelter the family and allow the head of the family to use homestead for his or her livelihood if he or she desired. Another purpose was to prevent families from becoming homeless and a burden to the state. Thus, 160 acres were sufficient to provide the family with a home and a farm. Conversely, if the home were in a city or town, one-half an acre was sufficient to provide the family with a home and place for a business.

Since January 7, 1969, the exemption for an urban homestead has been limited to the residence of the owner or the owner's family.<sup>206</sup> Prior to the 1968 revision, the urban homestead could include a business home.<sup>207</sup> The rural homestead has no such express limits on use. This amendment raises questions regarding what use is permissible for an urban homestead and what use is required for a rural homestead.

#### *i. Urban Homesteads*

An urban homestead is limited to the residence of the owner or family and up to one-half an acre of contiguous land.<sup>208</sup> If the property contains other buildings used for nonresidential purposes, that portion of the property can not qualify.

There is some question as to whether a portion of a home held for rent to others or a duplex unit for rent can qualify for the exemption. If property constitutes the owner's residence or the residence of the owner's family, then a temporary renting of a portion of that home will not result in loss of the exemption.<sup>209</sup> If the portion rented is *de minimis*, then that rental also

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205. FLA. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1885, art. X, § 1. Prior to the 1968 constitutional revision, the urban limitations applied to incorporated or unincorporated cities or towns rather than municipalities.

206. FLA. CONST. art. X, § 4(a)(1) (1984).

207. See FLA. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1885, art. X, § 1.

208. FLA. CONST. art. X, § 4(a)(1) (1984).

209. *Collins v. Collins*, 7 So. 2d 443 (Fla. 1942) (holding that owners' intent to return to residence after temporary rental during tourist season maintained the homestead exemption).



should be disregarded.

If a portion of the home is held for rent and the owner or family has no intent to reside there personally, then a portion of the homestead may be considered non-homestead property. If the property can be partitioned, the non-homestead portion can be sold via forced sale. If the property cannot be partitioned, the property should be treated the same as property owned by tenants in common, when neither tenant has the exclusive right to possess the homestead. The entire property should be sold, and the proceeds apportioned.<sup>210</sup> This should be the result, but there is case law allowing a person to exempt both the duplex unit in which he or she lives plus the unit rented for income when the rental unit cannot be sold separately under zoning laws.<sup>211</sup>

The courts should resolve the question of whether a unit that is held for the production of income, in the form of rent, can qualify as a homestead if the owner or family has no intent to occupy it as a residence. In addition, whether rental of one of the units once occupied as a residence by the owner or family constitutes an abandonment also should be resolved judicially. Until then, the issues involving the rental of a duplex or other homestead property should not be an appropriate issues for constitutional reform.

## ii. *Rural Homesteads*

At present, there is no limitation on the use of the 160 acres contiguous to the residence on an a rural homestead. Most assume that the use will be agricultural or related to farming or ranching. The constitution has never expressed such a limitation and it is not a requirement at present. Most rural homesteads are used as farms or have limited acreage. Some are condominium units located outside a municipality. The cases do not reflect any attempted abuse of these provisions; although, the courts have exempted contiguous acreage that has been platted suitable for future sale as individual lots.<sup>212</sup> Thus, it does not appear that there is a need to limit the rural

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210. See *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978) (holding that the homestead exemption does not preclude the forced sale of property owned by tenants in common when the forced sale is the only method by which the two owners could obtain enjoyment of their one-half undivided interest in the property).

211. *In re Kuver*, 70 B.R. 190 (Bankr. S.D. Fla. 1986); see also *supra* note 12 and accompanying text.

212. *Buckels v. Tomer*, 78 So. 2d 861 (Fla. 1955) (including as homestead, in addition to a residence on an unplatted tract of land, 27 subdivision lots that were platted and in some cases separated by streets, but otherwise contiguous). However, it is possible that an individual who develops and owns a condominium parcel outside of a municipality and who

homestead to any particular use, so long as a portion of it is used as the residence of the owner or the owner's family.

The constitution limits the urban homestead to the residence of the owner or the owner's family.<sup>213</sup> There is no comparable limit on the rural homestead. Prior to the 1968 revision, the head of the family was required to reside on the homestead, whether it was urban or rural.<sup>214</sup> After the constitutional revision in 1968, this requirement was deleted.<sup>215</sup> The rural property still must be a "homestead" to qualify; thus, it must be a permanent place of residence. Presumably, the rural homestead and urban homestead are similar in that the homestead can be the residence of the owner or the owner's family, but it must be the residence of at least one of them. The rural and urban homesteads then differ because the rural homestead is not limited just to the residence. This result, that the rural homestead can be the residence of the owner or his or her family, is generally understood to be correct; but there is no definitive case law on point. If the constitution is amended for other reasons, it would be appropriate to expressly provide this expanded residency provision for a rural homestead. This amendment should be a technical rather than a substantive amendment.

### iii. *Multiple Homesteads*

The constitution provides that a "homestead" owned by a natural person shall be exempt.<sup>216</sup> Prior to the 1968 revision, the owner was required to reside on the homestead.<sup>217</sup> The 1968 revision changed this so that the owner need not reside there if his or her family does.<sup>218</sup> This change was in the case of an urban homestead and is implied for rural homesteads. This raises the question of whether one owner can claim two homesteads, one for the owner's residence and a second if a different residence is used by his or her family. For example, this issue could arise if a husband owns his own home and is required to own and maintain another home for his former wife and their children.

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lives in one of the units could claim the entire parcel, including the other units for sale, as a homestead. In most cases, the developer uses a corporation to avoid personal liability rather than rely upon the homestead exemption. *See also* *Armour & Co. v. Hulvey*, 74 So. 212 (Fla. 1917) (rural homestead included a preparatory school for students and cadets).

213. FLA. CONST. art. X, § 4(a)(1).

214. FLA. CONST. of 1885, art. X, § 1; *see also* FLA. CONST. of 1868, art. IX, § 1.

215. FLA. CONST. art. X, § 4(a).

216. *Id.* § 4(a)(1).

217. *See* FLA. CONST. of 1868, art. IX, § 1; *see also* FLA. CONST. of 1885, art. X, § 1.

218. FLA. CONST. art. X, § 4(a)(1).

It is arguable that the constitution's reference to "a homestead"<sup>219</sup> means that a person can claim only one homestead as exempt. Further, it is arguable that an urban homestead is limited to the owner's residence or the family's, but not both. If only one can be exempt, chapter 222 of the Florida Statutes would allow the owner to designate which was exempt if the owner is alive;<sup>220</sup> however, the issue may arise after the owner's death. This issue has not yet been litigated on an appellate level, so that it may not be ripe for review. If the constitution is to be amended, this issue should be visited to determine if appropriate language should be added to limit the exemption to one homestead,<sup>221</sup> that being the owner's residence. If neither residence is used by the owner but both are used by different family members, then the owner should have the option of selecting which family residence is the exempt homestead.

### *c. Type of Qualifying Interest*

There have been significant changes in home ownership since 1868. There also have been changes since the last constitutional revision in 1968. At one time, the choice was between owning a single family home or renting an apartment. At present, a person can choose to own a single family home in the country or in the city. A person can choose to own a single family home in a development with common areas for all owners and a homeowner's association. Some new developments are zero lot line homes. A person can choose to own a duplex or triplex and rent some of the units to other families. A person can choose to live in a condominium and own his or her unit, plus an undivided interest in common areas. These condominium units may be units in a high-rise structure or a low-rise structure or they may be townhouses.

A person can live in a cooperative apartment, renting the unit from a corporation or association in which the person is a shareholder or member. A person can own land and a mobile or modular home and live in that home on that land. A person can own a mobile or modular home situated on land that the person leases from another. A person can own a houseboat or any other type of boat or yacht and live on it at a dock that the person owns as a condominium unit (a "dockominium"). A person also can own

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219. *Id.*

220. FLA. STAT. § 222.01 (1991).

221. The owner's permanent residence would qualify for the exemption. In the unusual case where neither was the owner's residence, then the owner could select which family residence was the exempt homestead.

and live on a boat kept in a rented boat slip.

Should the homestead exemption apply to all of these forms of ownership? Under present law, the issue is whether the applicable interest in any residence is an interest in an estate in land. If it is not, it only qualifies for a \$1000 constitutional exemption for personal property. To the extent that the interest does not qualify for the unlimited homestead exemption, the issue is whether it should. This section will consider the various forms of ownership in the context of the homestead exemption.

#### i. *Single Family Homes and Farms*

The present homestead exemption clearly applies to single family homes and farms. It also can apply to multiple family dwellings, with some limitations. If the multiple family dwelling is located within a municipality, the units that are not used as the residence of the owner or the owner's family should not qualify for the exemption.<sup>222</sup> Thus, the owner would own an exempt homestead as well as non-exempt property. Liens can attach to the non-exempt portion of the homestead, and it may be subject to forced sale. In such a case, the owner of the homestead within the multiple family dwelling is at risk that the property will be partitioned, if possible, or sold in its entirety to satisfy liens on the non-exempt portion. If the property is sold, the proceeds attributable to the exempt portion would qualify for the exemption; although the proceeds should lose their exemption if not reinvested within a reasonable period of time.<sup>223</sup>

#### ii. *Condominiums*

Ownership of an individual condominium unit used as the residence of the owner or the owner's family also qualifies. Ownership of a condominium includes ownership of an individual unit, which can include land, and ownership of an undivided interest in common areas.<sup>224</sup> Condominium

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222. See discussion *supra* part II.A.1.b.i (regarding the qualification of a duplex for the exemption). But see *In re Kuver*, 70 B.R. 190 (Bankr. S.D. Fla. 1986) (allowing homestead exemption for duplex, of which half was being rented out, because divided portion of duplex was not sellable under existing zoning laws).

223. This restriction is imposed on proceeds from a voluntary sale of a homestead. The proceeds can retain their exemption so long as the seller intends to reinvest them within a reasonable period of time after the sale, and does in fact reinvest them. See *supra* note 36.

224. A unit is defined as "a part of the condominium property which is subject to exclusive ownership" and "may be in improvements, land or land and improvements together." FLA. STAT. § 718.103(24) (Supp. 1992). A condominium parcel includes "a unit, together with an undivided share in the common elements which is appurtenant to the unit."

ownership is a unique form of ownership, that has been recognized as qualifying for the homestead exemption, when the unit is the residence of the owner or the owner's family.

If a condominium is located within a municipality, a potential issue is how the one-half acre of contiguous land limitation applies to a specific unit and its undivided interest in common areas. It is possible for the common elements to be located on more than one-half acre, so that the condominium owner has an undivided share in more than one-half an acre. The Florida Condominium Act provides that the undivided share in common elements is appurtenant to the unit and cannot be separated from it, nor can it be conveyed or encumbered except with a conveyance or encumbrance of the unit.<sup>225</sup> Thus, a lien that cannot attach to the condominium unit because of the homestead exemption should not be able to attach to the appurtenant undivided share of common elements. This is true even if the common elements exceed the acreage limitation, because of the provisions of the Florida Condominium Act. The condominium act extends the constitutional protection to the common elements that exceed the permitted homestead acreage.

Common areas can include an area for parking, areas for recreation, (such as a pool, playground, or tennis, racquetball or basketball courts),<sup>226</sup> and areas for personnel of the condominium association (such as manager, engineer, security, or valet). These areas are located on the entire tract of land comprising the condominium.<sup>227</sup> What if these common areas are used for a commercial purpose that would prevent the unit from being exempt if the unit were used for that commercial purpose? Such use should not preclude the exemption from attaching to the condominium unit.

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*Id.* § 718.103(11). The common elements are the "portions of the condominium property which are not included in the units." *Id.* § 718.103(7).

225. FLA. STAT. § 718.107 (1991).

226. See *White v. Posick*, 150 So. 2d 263, 265 (Fla. 2d Dist. Ct. App. 1963) ("the pool [in a one-story family dwelling house] and patio were conventional residential appurtenances—all well within the ambit of the constitution.").

227. If the condominium is located within a municipality, there may be a question as to how the one-half acre of contiguous land limitation applies to a specific unit, its undivided interest in common areas, and the condominium parcel of land. If the owner is treated as owning only a portion of the entire condominium parcel, then the interest can qualify if that portion is less than one-half acre. If that portion is computed based on the undivided percentage share the owner has in common areas, it will fit within the acreage limitations in most cases. Further, a question may be raised as to whether the use of common areas is residential. Does it matter if a common area is rented to a concession, such as a store that serves food or sells various sundry items?

Further, if the condominium unit qualified for the homestead exemption, the owner's undivided share in the common elements would be protected by the Florida Condominium Act—a lien that could not attach to the condominium unit could not attach to the owner's undivided share in the common elements.

The condominium or homeowner's association generally has the right to assess costs for maintaining common areas or recreational facilities. The Florida Condominium Act permits a lien to attach for unpaid assessments.<sup>228</sup> Most declarations of restrictions and covenants also authorize the imposition of a lien for non-payment of these amounts. Can a lien for non-payment of obligations for recreational leases, regular maintenance obligations, and special assessments attach to the homestead property? There are several ways that such a lien can attach. A lien can attach for "house, field or other labor performed on the realty" or for an obligation "contracted for the purchase, improvement or repair thereof."<sup>229</sup> In addition, a lien can attach to the unit prior to the time it attains its status as homestead, in which case it is considered a preexisting lien.

In the case of a recreational lease for a subdivision, the Supreme Court of Florida held that such a lien was part of an affirmative covenant created when the owners accepted their deed to their lot in the subdivision and that the lien related back to the time when the declaration of restrictions were filed.<sup>230</sup> These liens were considered to have attached to the land prior to the time the owners acquired their homestead interest in the property and thus, were valid liens against their homestead. This reasoning also should apply to liens for unpaid condominium maintenance fees and special assessments. Thus, a condominium homestead may be subject to a pre-existing lien for unpaid maintenance and assessments. Further, a condominium homestead may be subject to liens for obligations relating to the purchase, repair, or improvement of that unit or for house, field, and other labor for that unit. It is unclear whether a condominium unit qualifies for the homestead exemption would be subject to its share of any liens relating to the house, field, and other labor performed for the condominium common areas.

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228. FLA. STAT. § 718.116(5)(a) (Supp. 1992). Liens for unrelated condominium assessments relate back to April 1, 1992, or the creation of the condominium parcel, and includes a lien for interest and attorney's fees. *Id.*

229. FLA. CONST. art. X, § 4(a).

230. *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980).

### iii. *Homes with Subdivision Recreational Facilities*

In some subdivisions or developments, single family homes also can include an ownership or leasehold interest in recreational facilities. These facilities usually are not contiguous to each lot in the subdivision. It has not yet been determined how the present contiguity requirement or the acreage limitations would apply to the homeowner's interest in these facilities. Under a strict construction of the constitution, common areas that are not contiguous to the homestead parcel should not qualify for the exemption. However, these areas could be protected in a manner similar to the way common areas in a condominium are protected.<sup>231</sup> For example, the declaration of restrictions could provide that an interest in these areas can be transferred only with a transfer of the parcel that it serves. If each parcel owner has an undivided share in the facilities, the transfer of a parcel could operate as a transfer of that undivided share. Further, an encumbrance of the parcel also would be secured by the parcel and that parcel's undivided share in the common elements. However, the undivided share cannot be transferred or encumbered by itself. In this way, if a parcel qualifies for the homestead exemption, the same protection would extend to the parcel's undivided share in the common facilities.

### iv. *Mobile Homes*

An individual who owns land and resides in a mobile home permanently affixed to that land can qualify for the homestead exemption provided for realty under the constitution. There is some question whether an individual who owns and resides in a mobile home, but does not own the land upon which the mobile home is situated, can claim the homestead realty exemption for the mobile home and leasehold interest. The issue is whether the leasehold satisfies the constitutional definition of a homestead on realty.<sup>232</sup>

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231. See discussion *supra* part II.A.1.c.ii.

232. A similar issue arises if a condominium parcel is leased rather than owned. The Background Papers for the Constitutional Revision Commission in 1977-78 reflect the following:

[W]hether the Revision Commission wishes to expand the umbrella of protection to include kinds of living situations which are becoming increasingly common in this day of high housing costs or whether the also increasing incidence of bankruptcy and skipping out on bad debts should encourage a conservative approach. Even where the mobile home is "affixed" to the property, there is no denying the relative ease with which the mobile home can be made mobile again when compared to standard housing. On the other hand, it is difficult to see a

In 1977, section 222.05 of the Florida Statutes was amended to provide that:

Any person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his own which he may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his homestead, *shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid.*

The purpose of this amendment was to extend the homestead exemption to a person who owned the mobile home and had the legal right to possess the land.<sup>233</sup>

This statute raises many questions. What is the meaning of "aforesaid"? Florida Statutes section 222.01 provides a procedure so that "any person residing in this state [who] desires to avail himself of the benefit of the provisions of the constitution and laws exempting property as a homestead from forced sale under any process of law" may make a statement designating and declaring real property or a mobile home as exempt.<sup>234</sup> Is this the "aforesaid" exemption? Is a mobile home exempt from liens attaching to it or just from levy and forced sale? In addition, is a mobile home exempt from obligations contracted to purchase, repair, or improve the mobile home or for taxes or special assessments thereon? Is the leasehold interest exempt or just the mobile home? The statute only exempts the mobile home.

These issues are not constitutional issues; instead, they only relate to the statutory exemption granted to mobile homes on leased or lawfully possessed land. Chapter 222 of the Florida Statutes should be amended to

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great difference where the mobile home owner also owns the land as well, as far as protection of the family's domicile is concerned. In fact F.S. 222.05 allows a person to set apart as homestead a dwelling house which is owned but maintained on land which is not. This is probably an area where it would be helpful to have empirical data on the number, length of residence, and financial history, of those who reside in mobile homes which they own but maintain upon the land of others.

*Background Papers, Constitutional Revision Commission 1977-78*, at 3 (copy on file at the Nova Law Review office).

233. See *Smith v. American Consumer Fin. Corp.*, 21 B.R. 345, 349 (Bankr. M.D. Fla. 1982) (noting that Florida Statutes, section 222.02 (1979), which it called the "real property exemption implementation statute . . . has only been amended once since its enactment in 1869, and that was to expand its coverage to include protection of mobile homes.").

234. FLA. STAT. § 222.01 (1991).



clarify that the statute exempts mobile homes from the attachment of liens and from forced sale in the same manner as the constitution exempts homestead realty. This statutory exemption should be subject to all the exceptions applicable to the constitutional amendment. The mobile home and leasehold interest also should be subject to any liens to which the lessor is entitled.<sup>235</sup> At the same time, the statute could allow the owner to alienate or devise the mobile home and any leasehold interest, capable of being alienated or devised.<sup>236</sup> In this way, the mobile home could be freely alienated during the owner's lifetime and devised at death without restriction.<sup>237</sup>

#### v. *Cooperatives*

At first blush, a cooperative appears similar to a condominium and thus, it seems logical to extend the exemption and transfer provisions to cooperative ownership. But cooperative ownership differs significantly from condominium ownership.

In a cooperative, a corporation owns the land and building or may lease the land under a long-term lease.<sup>238</sup> The corporation has the power to sell, mortgage, or transfer the land and building. The corporation's articles of incorporation may restrict these rights or require some form of shareholder approval for transfer of corporate assets. The corporation may have members or shareholders who own shares of stock in the corporation. Interest as a member or shareholder does not grant the holder any interest in a specific unit in the corporate building, the right to partition the property, or the right to receive the unit he or she leased upon dissolution of the corporation. If the corporation is dissolved, each shareholder will receive an undivided interest in the land and the building, including all its units, subject to outstanding leases. If a resident shareholder wants to receive sole ownership of a residential unit plus an undivided interest in common areas, the land and building must be converted into a condominium.

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235. See FLA. STAT. § 712.77 (Supp. 1992) (lien for unpaid rent on "goods, chattels, or personal property of such occupant"); see also *id.* § 723.084 (lien for storage).

236. If the right to alienate or devise is to be restricted by statute, the statute must meet the test mentioned in *Shriner Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990), as discussed *supra* in text accompanying notes 225-227.

237. The constitutional restrictions on devise do not apply to the \$1000 personal property exemption.

238. Chapter 719 of Florida Statutes provides for an unexpired term of at least 50 years. FLA. STAT. § 719.401 (1988).

Each shareholder usually will enter into a lease with the corporation for the exclusive right to possess a specific unit or will have some other “muni-ment of title” to an apartment unit. Restrictions usually are placed on a shareholder’s right to transfer the lease and shares. A shareholder can use his or her shares as collateral for a loan without the corporation’s consent, if a lender is willing to accept them.

Ownership of shares and a lease of a cooperative apartment unit differ from ownership of a mobile home and a lease of the land on which the mobile home is situated. In the case of a cooperative, a person does not own a unit he or she leases; instead, that person has lawful possession of the unit and the land on which it is situated. A corporation owns the land and building in which the unit is located. Although a cooperative parcel includes an undivided share of the assets of the corporation as an appurtenance to the unit, ownership of shares in that corporation does not grant the shareholder specific ownership in any corporate asset.<sup>239</sup> The same result applies when the corporation is not-for-profit and has members instead of shareholders.

Thus, a shareholder/lessee has no proprietary ownership in any unit. Instead, the shareholder leases an apartment unit. By contrast, a mobile home owner owns the mobile home and leases only the land.<sup>240</sup> This is a significant difference. In addition, the corporation may incur liabilities that can reach the entire building, including the individual units. If the exemption were extended to an owner’s stock interest, the exemption would be subject to liabilities that indirectly affect the value of the shares.

If the exemption is extended to cooperatives, one question is whether the exemption would be limited to the owner’s interest in the lease of the residential unit or would extend also to the ownership of shares of stock in the corporation. Even if the shares of stock or membership in the association qualified for the exemption, the land and building, including the residential unit, could be subject to liens for the debts and liabilities of the corporation and forced sale. The corporation could sell, mortgage, or

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239. FLA. STAT. § 719.05(1)(b) (1991). *See also* FLA. STAT. § 711.43(2)(b) (1975) (the predecessor statute—replaced by chapter 719).

240. A mobile home park also may be owned as a cooperative. If the shareholder or member of the association owns his or her mobile home, that mobile home should qualify for the exemption. *See* FLA. STAT. § 222.05 (1991). The mobile home owner’s lawful right to possess that land would be sufficient under that statute. Whether the mobile home owner’s interest in the cooperative that owns the land that the mobile home owner leases is exempt is a different question that depends on the interpretation of section 222.05 of the Florida Statutes. *See id.* However, the constitutional exemption would not apply to the cooperative shares or membership.

otherwise alienate the land and building without the consent of the shareholder/lessees or the spouses of any married shareholder/lessees, unless the documents relating to the association provided otherwise, or Florida law regarding cooperatives is changed. Therefore, allowing a cooperative unit to qualify for the homestead exemption would not provide all the protection accorded the owner and family of a single family home or a condominium unit.

Granting homestead status to the shares of stock in a cooperative creates a full exemption, with only half of the impact. It is an incomplete exemption, not because of the limitations of the exemption but because of the corporate ownership of the land and building. Chapter 222 should be amended to extend the exemption accorded a mobile home to cooperatives, so that a person's membership or shares in the corporation, plus the lease or other muniment of title to the unit, could qualify for the exemption.<sup>241</sup>

#### vi. *Floating Homes*

What then about floating homes—boats owned by individuals who own a dock slip attached to land as a condominium, and who lease the dockage? The boats are in the water. Is the fact that the owner's access to the boat and access to utilities is via a dock attached to land significant? Is the fact that the owner obtains ownership of the interest in the dock condominium through a deed significant, or that the dock is taxed as real property? The connection is tenuous. Even if a mobile home could qualify as a homestead under the constitution, a boat could not. Furthermore, the statute intended to exempt mobile homes, specifically defining a dwelling home to include a mobile home.<sup>242</sup> It is a stretch to interpret the term "dwelling home . . . on land" to include a boat in a dock slip attached to land.<sup>243</sup>

The constitutional homestead protection for realty does not extend to floating homes.<sup>244</sup> Instead, the owner is limited to a \$1000 exemption for personalty. There does not appear to be a compelling need to extend the constitutional exemption to boat owners. A person who resides on Florida waters does not need to be guaranteed the same protection from creditors as

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241. The issue of whether the shares should be subject to alienation or devise, and whether the lease could or should be subject to alienation or devise, also would need to be considered.

242. FLA. STAT. § 222.05 (1991).

243. Oregon exempts mobile homes and includes boats within the definition of a mobile home; however, this exemption is a statutory exemption limited by a dollar amount of \$15,000. OR. REV. STAT. § 23.164 (1983).

244. It is arguable that it could encompass the dock slippage, but not the boat.

one who resides on Florida land. A person who desires protection should purchase a home on land, whether it be a single family home, a multi-family dwelling, or a condominium. If a person cannot afford a permanent structure, an argument can be made for extending the exemption to a mobile home on land lawfully possessed by the owner, even if the mobile home can be removed from the land,<sup>245</sup> but not to a boat on water even if it is kept in a dock.

### vii. *Future Interests*

At present, the exemption does not extend to a nonpossessory future interest, such as a remainder interest. In *Aetna Insurance Co. v. La-Gasse*,<sup>246</sup> the supreme court held that the holder of a vested remainder interest cannot qualify for the exemption while the life estate is in existence. The primary reason is that the holder of the remainder interest does not have a present interest in the property. The holder of the remainder interest cannot satisfy the residency requirement, because the remainder beneficiary cannot reside on that interest. Residing with the life tenant is insufficient.<sup>247</sup>

This rule can work to the detriment of a person who is dependent on the life tenant for shelter or was dependent on the decedent for such. For example, a child can lose his or her remainder interest to a creditor; whereas, the surviving spouse's life estate is protected from the spouse's creditors. This is unfair, particularly if the child were a minor when the first spouse died, because the constitutional prohibition on devise was designed to protect that minor. Unfortunately, the statutory remainder interest does not provide the minor adequate protection.

To the extent a descendant or other person receives a remainder interest

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245. See e.g., ALA. CODE § 6-10-2 (1992); ARIZ. REV. STAT. ANN. § 33-1101 (1956); COLO. REV. STAT. ANN. § 13-54-102 (West 1987); IDAHO CODE § 55-1003 (1989); MO. ANN. STAT. § 513.430 (Vernon 1992); N.Y. CIV. PRAC. L. & R. 5206 (McKinney 1980); OR. REV. STAT. § 23.164 (1983); UTAH CODE ANN. § 78-23-3 (1990); WASH. REV. CODE ANN. § 613.030 (West 1987).

246. 223 So. 2d 727 (Fla. 1969).

247. *Id.*

The uniform view of the courts in similar situations, however, has been that consent by a life tenant to a remainderman's occupancy does not divest the life tenant of a paramount present interest. The record here presents no reasonable basis upon which any conveyance of a present interest to respondent [daughter] and owner of remainder interest can be found.

*Id.* at 729 (footnote omitted).

in property and resides there with the permission of the life tenant, that interest should qualify for the exemption. A constitutional amendment is required to effectuate this change.

#### viii. *Conclusion Regarding Extension of Exemption*

The constitutional homestead exemption should continue to apply only to an interest in an estate in land. Any extension of the exemption to mobile homes on land lawfully possessed, but not owned, or to cooperatives should be by legislative fiat.

The constitutional exemption should be extended to a remainder interest when the owner of that remainder interest resides with the life tenant on the property. Consideration should be given to: (1) creating an exemption for leasehold interests, to the extent those interests have value<sup>248</sup> (whether it be limited or unlimited in value), and, (2) changing or increasing the \$1000 personalty exemption in the constitution. The personal exemption could be extended to apply to items of furniture and other household items reasonably necessary for use in the exempt homestead (with or without a value limit).

### 2. Scope of Exemption and Exceptions

Florida is a "creditor beware" state when it comes to homestead. The exemption is broad and the exceptions are narrow. A creditor cannot rely upon a homestead to satisfy its debt, unless the debt has some direct relationship to the homestead, (e.g., purchase, repair, improvement, or labor) or the debtor agrees to secure that debt with a mortgage (and if married, the spouse consents), or there are countervailing equitable considerations.<sup>249</sup> In many cases, a potential creditor can protect itself by obtaining security. In other cases, a potential creditor can insure against the risk or may find protection under the homeowner's insurance coverage. Additionally, doctors, hospitals, and nursing homes may choose not to provide services

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248. The leasehold could have value due to improvements to the leased property or the right to assign or sublease it. If the leasehold is exempt, then consideration needs to be given to whether a married lessee can assign the lease without joinder of the spouse and whether the landlord's right to evict would be affected by a spouse's rights. Also, an exception to the exemption would be needed for a landlord's lien. The exemption could be constitutional or statutorily granted.

249. *Palm Beach Sav. & Loan Ass'n v. Fishbein*, 619 So. 2d 267 (Fla. 1993) (mortgagee at risk when it failed to supervise mortgage execution and husband forged wife's signature, except to extent equitable lien granted for proceeds used to satisfy preexisting mortgages and taxes); *Bigelow v. Dunphe*, 197 So. 2d 328 (Fla. 1940) (creditor at risk when it receives a mortgage without spouse's joinder).

unless there is health insurance coverage, prepayment, or a guarantee of payment by another.

In determining whether the scope of the exemption should be limited or the exceptions expanded, it is helpful to consider which types of creditors cannot protect themselves against non-payment by a homeowner and whether they should have a claim superior to the exemption.

#### *a. Tort Creditors*

A tort creditor generally is not protected under homestead law. It is arguable that a person who was injured repairing or improving the homestead could receive a valid lien against the homestead because of a laborer's ability to place a mechanic's lien on the property for unpaid labor.<sup>250</sup> Other tort creditors might not have such lien rights.

A tort creditor usually cannot anticipate the tort or the resulting injury and is at risk that the tortfeasor will not have sufficient, nonexempt assets to satisfy that liability. In some cases, a person can insure against an injury or loss that a tortfeasor might cause. Uninsured motorists coverage, health insurance, life insurance, and disability income insurance can insure against some of these risks. But the amount of the insurance coverage may be less than the tortfeasor's liability.

Should a Florida homestead be liable for debts arising in tort such as from the debtor's negligence or other torts? It seems inappropriate to subject a homestead to liability for ordinary negligence and tortious conduct unrelated to the homestead. It is possible that an exception should be made for liability arising out of the owner's gross negligence or willful misconduct. Maine is one of the few states that provides a specific homestead exception for "judgments based on torts involving other than ordinary negligence on the part of the debtor."<sup>251</sup> But what if the homestead is the residence of the owner's spouse or other family members? The exemption protects them too. Should their shelter be jeopardized by one wrongful act of the owner?

It is arguable that the homestead should be liable for any injuries, resulting from gross negligence or willful misconduct, directly connected to the homestead, but not for other tort liability. For example, if a person who was invited to the owner's home was injured because the owner was grossly negligent in maintaining the home and did so with willful disregard for the safety of others, that owner should not be able to hide behind the homestead

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250. FLA. CONST. art. X, §4(a)

251. ME. REV. STAT. ANN. tit. 14, § 4422 (West 1991).

exemption to escape that liability. It does not seem necessary to create a specific exception for this purpose. First, it is unlikely that a homeowner will maintain a home in such condition because to do so would expose the homeowner and the homeowner's family to great risk of harm from that condition. Second, if the property is so dangerous, the property may not be exempt. The homeowner might abandon the homestead because of the danger. If the home were permanently abandoned, the exemption would be lost and a lien could attach to the property for that liability. If it was temporarily abandoned, the chance of the owner inviting persons to that home would be slim. A better solution would be to require a homeowner to maintain liability insurance for such purposes, rather than to limit the constitutional exemption. Third, to allow the owner to claim the exemption in egregious cases might result in a "fraud or unjust imposition on creditors," so that the homestead would not be exempt from tort liability.<sup>252</sup> Consequently, there is no compelling need to amend the exemption to provide a specific exception for tort liabilities.

*b. Alimony Maintenance or Support Creditors*

A spouse, former spouse, or child with a claim for alimony, maintenance, or support payments generally is not protected under Florida homestead law. These claims do not fall within the specific exceptions to the present exemption. Under limited circumstances, these claims can reach the homestead if the claims are secured by a mortgage, a pre-existing lien on the homestead, or an equitable lien. In addition, a court might prohibit the obligation claiming the exemption if to do so would operate as a fraud against the former spouse or child; but it is questionable whether such judicial action would withstand appeal.<sup>253</sup> Otherwise, a judgment for alimony or support cannot become a valid lien against the homestead or force its sale.

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252. The court could allow the exemption but impose an equitable lien for such liability; thereby overriding the exemption. See discussion *supra* in text accompanying notes 49-51.

253. Compare *Isaacson v. Isaacson*, 504 So. 2d 1309 (Fla. 1st Dist. Ct. App. 1987) with *Gepfrich v. Gepfrich*, 582 So. 2d 743 (Fla. 4th Dist. Ct. App. 1991). In *Gepfrich*, the former husband who was \$20,000 in arrears in alimony and had an income of \$4700 a month purchased a \$300,000 homestead, maintained it at a cost of over \$3000 a month, and lived there with a girlfriend who did not contribute to its maintenance. The trial court ordered him to sell his house to satisfy his alimony and the district court affirmed that order. The court held that he was "attempting to use the homestead exemption law as a [sic] instrument to defraud his former wife and to escape his honest debt to her." *Id.* at 744. The authority of this case is questionable.

Under prior law, several cases held that a person who failed to satisfy support obligations to family members could not be considered the head of that family. Accordingly, homestead status was denied and the former spouse or child was able to obtain a lien against the nonhomestead property in which the owner resided. The support obligation was not considered an exception to the exemption, but failure to pay support was considered a bar to qualification for the exemption. Under the present exemption, any natural person can qualify for a homestead exemption. Thus, failure to pay alimony or support normally will not preclude a claim for a homestead exemption. It is unclear whether this result was contemplated when the natural person amendment was proposed and approved.

At present, a person with a claim for alimony, support, or maintenance has a solution under bankruptcy law.<sup>254</sup> If the debtor becomes insolvent, and a voluntary or involuntary petition in bankruptcy is filed, the homestead will not be exempt from this type of prebankruptcy debt.<sup>255</sup> There is some question whether these creditors can reach the homestead in a proceeding under state court or must limit collection to the bankruptcy proceeding.

An argument can be made that a Florida homestead should not be exempt from liens for alimony and support obligations. But this should occur only as a last resort.<sup>256</sup> The Bankruptcy Code provides that last resort. Thus, the federal bankruptcy laws provide a remedy for such debtors. This remedy should be tested judicially.<sup>257</sup> If, and only if, the Bankruptcy Code does not provide these persons with an adequate remedy, then consideration should be given to amending the Florida Constitution in this regard. If bankruptcy law does not provide that remedy, consideration also should be given to the fact that the homestead exemption may provide

254. See 11 U.S.C. §§ 522(c)(1), 523 (a)(1). For a discussion of when a claim is for alimony, support, or maintenance, see Frank Nussbaum, *A Second Bite at the Apple for Dissolution Clients*, 67 FLA. B.J. 85 (No. 9 Oct. 1993).

255. 11 U.S.C. §§ 522(a)(1), 523(a)(5); see also *Feldman v. Grimes*, 46 B.R. 84 (Bankr. D. Md. 1985).

256. See *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985) (holding that as a last resort, a beneficiary's right to a distribution from a spendthrift trust could be subject to liability for payment of that beneficiary's alimony obligations).

257. The Bankruptcy Code has the effect of subordinating the exemption to certain debts. The United States Constitution authorizes federal laws regulating bankruptcies. Is 11 U.S.C. § 522(c) constitutional? It should be to the extent it allows a Florida homestead to be administered by a bankruptcy trustee and sold to satisfy these types of preferred debts. Further, it is constitutional for certain debts not to be dischargeable in bankruptcy. An additional question is whether the United States Constitution authorizes the Bankruptcy Code to subject an asset to liability in a state proceeding for a debt from which that asset is liable under state law.



shelter for persons that the owner is legally obligated to support, such as a new spouse or other children. Thus, at the present time, there is no compelling argument that a specific exception to the exemption should be created for alimony, maintenance, or support liabilities.

### *c. Other Creditors*

Creditors who can reach nonexempt assets but cannot reach exempt assets are at risk that a debtor will convert nonexempt assets to exempt assets. A person who uses a nonexempt asset to purchase a homestead in Florida is converting the nonexempt asset into an exempt asset. A person who uses a nonexempt asset to satisfy a mortgage on a homestead can increase the net value of the exempt asset. Similarly, a homestead owner can purchase additional acreage contiguous to the homestead and additional acreage will become part of the exempt homestead. Under present law, absent unusual circumstances, a creditor cannot have the purchase or satisfaction set aside, or obtain a lien superior to the exemption.

Florida had a fraudulent transfer statute from 1923 to 1988.<sup>258</sup> When this law was in effect, the federal circuit court of appeals held that the use of nonexempt funds to purchase an equitable interest in a homestead was not fraudulent as to creditors. The court stated in *Beall v. Pinckney*,<sup>259</sup> that "the intention to do what the Constitution not only permits but provides, is not an intention to hinder and defraud creditors within the meaning of the Florida Statutes [section 726.01 regarding fraudulent transfers]."<sup>260</sup>

This statute did not reach the transfer by a debtor of property that qualified as the debtor's homestead to another, because the creditors had no right to reach the homestead before the transfer was made.<sup>261</sup> This statute

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258. FLA. STAT. § 726.01 (1987) (repealed 1988). This statute voided gifts, sales, and transfers made with "the intent to delay, hinder or defraud creditors."

259. 150 F.2d 467 (5th Cir. 1945).

260. *Id.* at 471 (referring to section 726.01 of the statutes regarding fraudulent transfers).

261. *Rigby v. Middlebrooks*, 135 So. 563, 564 (Fla. 1931) ("as to exempt creditors there are no creditors within the meaning of statutes prohibiting the conveyance of property in fraud of creditors, and as homesteads are exempt from execution, a creditor acquires no rights in regard thereto."); *see also* *Murphy v. Farquhar*, 22 So. 681, 683 (Fla. 1897) (creditor who could not receive homestead if husband had not conveyed it to his wife, cannot contest conveyance because "attempted transfer . . . cannot give to any unexcepted judgment against him any other, further or greater right in or to such homestead than it had before such attempt had been made."); *Saint-Gaudens v. Bull*, 74 So. 2d 693 (Fla. 1954) (conveyance by mother of her homestead to daughter was not made to defraud mother's creditor); *Grass v. Great American Bank*, 414 So. 2d 561, 562 (Fla. 3d Dist. Ct. App. 1982) ("Alfred Grass's

also did not reach conversion of nonexempt assets to exempt assets, because the intention to claim an exemption was not an intention to delay, hinder, or defraud creditors. This statute, however, was broad enough to reach a gratuitous transfer of a nonexempt asset by a debtor, even if the transferee could claim the property as an exempt homestead.

In 1988, Florida adopted the Uniform Fraudulent Transfer Act.<sup>262</sup> Under this act, a transfer can be fraudulent as to a particular creditor if it is made before or after a claim arose with the "actual intent to hinder, delay, or defraud any creditor of the debtor."<sup>263</sup> Effective October 1, 1993, a new statute was enacted to grant relief to a creditor when a debtor fraudulently converts nonexempt assets into products or proceeds that are exempt by law.<sup>264</sup> For this purpose, the conversion is fraudulent if it is made "with the intent to hinder, delay or defraud the creditor." This statute can apply to a creditor whether the "claim to the asset arose before or after the conversion."<sup>265</sup> This statute raises several questions. One question is whether a homestead purchased from nonexempt funds can be "proceeds" of these funds. This would be an unusual interpretation of the term "proceeds." If it could be interpreted that way, another question is whether the purchase of a homestead can be made with the intent to hinder, delay, or defraud a creditor. Based on the predecessor statute, the mere conversion

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subsequent conveyance of his interest in the homestead cannot be fraud upon Great American Bank since the property was beyond the reach of Great American Bank due to its homestead character, which was clearly established prior to entry of any judgment against Mr. Grass."); *Freehling v. McDonald*, 16 B.R. 618 (Bankr. S.D. Fla. 1981) (gratuitous transfer of undivided one-half interest in debtor's homestead was not fraudulent conveyance under Florida Statutes, chapter 726, section 01 because at time of conveyance it was debtor's homestead; whereas, later conveyance of other one-half interest was a fraudulent conveyance because it was made when property was no longer debtor's homestead because debtor was no longer head of a family and had moved from property and rented it). *But see* *Roemelmeyer v. Vidana* 19 B.R. 787, 788 (Bankr. S.D. Fla. 1982) (gift to daughter of homestead owned by parents as tenancy by the entirety avoidable, where daughter sold home two weeks later in prearranged sale and gift was made to prevent levy on nonexempt homestead proceeds).

262. FLA. STAT. ch. 726 (1988). In *United States v. Romano*, 757 F. Supp. 1331, 1335 (M.D. Fla. 1989), the court noted that the Uniform Fraudulent Transfer Act adopted by Florida "does not displace the principles of law and equity that were developed under previous statutes and case law." See FLA. STAT. § 726.111 (1991).

263. FLA. STAT. § 732.105 (1991); *Romano*, 757 F. Supp. at 1331 (transfer of homestead to son for inadequate consideration avoided to enforce federal tax liens; however, government's tax lien is superior to homestead exemption under Florida law).

264. Ch. 93-256, § 5, 1993 Fla. Laws 2497, 2499 (to be codified at FLA. STAT. § 222.30).

265. *Id.*

of non-exempt assets into exempt assets does not satisfy that intent element.

Effective October 1, 1993, the Florida Legislature extended the fraudulent transfer doctrine so that an exemption provided under Florida Statutes chapter 222 is not effective if it results from a "fraudulent transfer or conveyance under chapter 726."<sup>266</sup> The homestead realty exemption is created by the Florida Constitution, not chapter 222 of the Florida Statutes.<sup>267</sup> Thus, the Florida Uniform Fraudulent Transfer Act and its extension do not enable a creditor to reach the purchase of a homestead, payment of a mortgage on a homestead, or conveyance of a homestead to another if the homestead is exempt under the constitution. The Act could apply to the extent a mobile home on leased land is statutorily exempt absent additional, unusual factors.<sup>268</sup> In addition, the conversion of nonexempt assets into exempt assets generally is not prohibited under the Bankruptcy Code,<sup>269</sup> although certain transfers are avoidable.<sup>270</sup>

The Florida Uniform Fraudulent Transfer Act also provides that a transfer may be fraudulent if the debtor does not receive "reasonable and equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at the time of the transfer or the debtor became insolvent as a result of the transfer obligation."<sup>271</sup> A transfer of nonexempt assets to exempt assets usually involves an exchange of equivalent value. Thus, a transfer of assets into a homestead made when the debtor was insolvent, or was rendered insolvent, should not be covered by the act. Based on the judicial interpretation of the predecessor statute,<sup>272</sup> it also is questionable

266. *Id.* § 4, 1993 Fla. Laws at 2499 (to be codified at FLA. STAT. § 222.29 (effective Oct. 1, 1993)).

267. Florida Statutes sections 222.01-222.08 provide the procedures for a person to follow to claim the constitutional exemption.

268. See FLA. STAT. §§ 222.05, 222.29 (1991).

269. See *Govaert v. Primack*, 89 B.R. 954 (Bankr. S.D. Fla. 1988) (move to Florida and acquisition of \$450,000 homestead 18 months before filing bankruptcy petition was not a fraudulent transfer avoidable under the Bankruptcy Code); *Tavormina v. Robinett*, 47 B.R. 591, 592 (Bankr. S.D. Fla. 1985) (transfer of wife's homestead to tenancy by the entirety not avoidable even though transfer made when both husband and wife were insolvent, because "transfer of exempt property cannot adversely affect any creditor, and therefore, cannot be fraudulent transfer [under 11 U.S.C. § 548(a)]."); *Judson v. Levine*, 40 B.R. 76 (Bankr. S.D. Fla. 1984) (use of \$100,000 to satisfy line of credit secured by mortgage on homestead four days prior to filing bankruptcy petition was not fraudulent on grounds for imposition of an equitable lien).

270. See *e.g.*, 11 U.S.C. § 547 (1988).

271. FLA. STAT. § 732.106 (1991). A debtor with exempt assets may be insolvent. *Id.* §§ 732.102, 732.103.

272. See *supra* notes 261-63 and accompanying text.

whether this act can be used to avoid the constitutional exemption.

There is a judicial exception to the homestead exemption that may help. The Supreme Court of Florida has stated that the homestead laws should be liberally construed but not interpreted or applied "to make them instruments of fraud or unjust imposition upon creditors."<sup>273</sup> This raises the question as to what type of fraudulent conduct or set of facts would preclude application of the homestead exemption.

Generally, acquiring an exempt homestead does not make the exemption an instrument of fraud. This is true even if this results from a conversion of nonexempt assets to exempt assets. Moreover, a person can expand a homestead by acquiring additional acreage contiguous to an existing homestead, even when the acreage is acquired when the person is subject to an outstanding judgment.<sup>274</sup> The exception to this rule arises when the nonexempt assets used to purchase the initial homestead property or the additional acreage were fraudulently obtained. In some cases, the fraud will result in denial of the exemption completely.<sup>275</sup> In other cases, the fraud will result in the imposition of an equitable lien.<sup>276</sup> In one liberal decision, a Florida district court held the exemption would work a fraud against a former wife due alimony if her former husband was allowed to claim the exemption for a home. In *Gepfrich*, the husband had purchased the home when he was in arrears on alimony payments and claimed he could not afford to maintain the new home and pay his current and past due alimony obligations.<sup>277</sup>

In addition, using nonexempt assets to satisfy a mortgage on a homestead will not make the exemption an instrument of fraud, especially

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273. *Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 450 (Fla. 1943). See *Milton v. Milton*, 58 So. 718, 719 (Fla. 1912) and *Jettson Lumber Co. v. Hall*, 64 So. 440, 442 (Fla. 1914) for similar language. Some district courts have extended this by stating that the homestead exemption laws also should not be applied "as a means to escape honest debt." See, e.g., *Gepfrich v. Gepfrich*, 582 So. 2d 743, 744 (Fla. 4th Dist. Ct. App. 1987) (homestead exemption could not be used to defeat claim for alimony); *Frase v. Branch*, 362 So. 2d 317, 319 (Fla. 2d Dist. Ct. App. 1978), *appeal dismissed*, 368 So. 2d 1362 (Fla. 1979) (contract to sell a portion of tract exceeding 160 acres, signed by one spouse only, could not be avoided by claiming that portion was part of the homestead exemption, when the portion retained exceeded 160 acres); *Vandiver v. Vincent*, 139 So. 2d 704, 708 (Fla. 2d Dist. Ct. App. 1962).

274. *Quigley v. Kennedy & Ely Ins., Inc.*, 207 So. 2d 431 (Fla. 1968), *cert. denied*, 210 So. 2d 869 (Fla. 1968).

275. *In re Gherman*, 101 B.R. 369 (Bankr. S.D. Fla. 1989) (exemption denied on alternate grounds for use of embezzled funds to purchase homestead or abandonment).

276. See *supra* notes 49-51 and accompanying text.

277. 582 So. 2d at 743.

if the property was mortgaged after the exemption attached. An exception may apply when the funds used to satisfy the mortgage were wrongfully obtained. In most cases, the remedy would be to grant the injured party an equitable lien upon the homestead.<sup>278</sup>

Presently, the burden is on a creditor to reach property before it becomes exempt or is converted into an exempt asset.<sup>279</sup> Should this result change by allowing the fraudulent transfer doctrine to extend to conversions of nonexempt assets into a constitutionally exempt homestead?

Consideration should be given to shifting the burden if two elements are met. First, the conversion occurs when the debtor is insolvent or when the conversion renders the debtor insolvent. Second, the person whose claim arose before the conversion must have been prevented from reaching the nonexempt asset *because of circumstances beyond the person's control*. Lack of diligence on the part of the creditor would not be one of those circumstances. For example, this exception would protect a creditor if an insolvent debtor converts assets while a case is pending on the creditor's cause of action, but before a judgment is rendered against the debtor. Additionally, it would apply if an insolvent debtor converts assets, after a judgment creditor schedules a deposition to discover whether the debtor has nonexempt assets but before the deposition takes place. It also should protect a creditor who was recorded with a judgment in the county where the homestead property is located or acquired.

Would such a result provide unequal treatment for debtors? Under this approach, a person with an existing creditor who is insolvent or will become insolvent after a conversion will not be able to exempt property he or she purchased. By contrast, a person who is solvent can purchase a homestead and exempt it from a future creditor, whose cause of action arose after the purchase, even if the debtor thereafter becomes insolvent. This treatment is analogous to situations where a solvent person makes a gift that cannot be set aside present or future by creditors as a fraudulent conveyance; while a present creditor could have the gift set aside if the debtor were insolvent at the time of the gift.<sup>280</sup> When the insolvency occurs, in relation to the

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278. *Friedman v. Luengo*, 104 B.R. 489 (Bankr. S.D. Fla. 1989) (equitable lien imposed on homestead in favor of corporation for funds wrongfully taken from corporation's escrow account). *But see Raymos v. Collins*, 19 B.R. 874 (Bankr. R.D. 1982) (debtor was denied discharge when he used "business resources to satisfy a mortgage on his homestead" and also because he failed to disclose the transfer).

279. *Heddon v. Jones*, 154 So. 891 (Fla. 1934).

280. *See* FLA. STAT. § 726.105 (1991) (exceptions when transfers can be voidable by future creditors).

transfer or acquisition of an exempt asset, it creates unequal treatment and that is appropriate. Solvent debtors are treated differently from insolvent debtors with respect to their conveyances and transfers. Each would be entitled to claim the exemption with respect to creditors' claims that arose after the transfer or conversion occurred.

Whether a conversion while insolvent can be set aside should be tested under the judicial fraud exception or the applicable statutes. If the courts determine that a creditor cannot reach the converted assets under present law, then a new statute or constitutional amendment should be considered.

#### *d. Judgment Creditors When Homestead is Sold*

A judgment creditor cannot obtain a valid lien against a Florida homestead unless it falls within an exception or the homestead is abandoned. The supreme court has stated that "once property acquires the status of homestead such characteristic continues to attach to it unless the homestead be abandoned or alienated in the manner provided by law."<sup>281</sup> The meaning of the reference to alienation is unclear, unless it is considered a reference to the issue of whether the proceeds from an alienation by sale are exempt.

A sale by a married owner is an alienation for purposes of the joinder requirement. This raises an issue as to whether a sale or the execution of a contract to sell a homestead, or the sale itself, is an abandonment or alienation of the homestead for creditor purposes. This would be relevant if the seller does not intend to reinvest the proceeds in another home.<sup>282</sup> If the sale is not considered an abandonment or alienation, the sale can be made free of liens, other than excepted liens. The seller will be entitled to receive the proceeds without having to satisfy those creditors at the time of

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281. *Wilson v. First Nat'l Bank & Trust Co.*, 64 So. 2d 309 (Fla. 1953). See also *In re Estate of Skuro*, 487 So. 2d 1065, 1066 (Fla. 1986); *Clark v. Cox*, 85 So. 173, 174 (Fla. 1920).

282. If the seller resides on the property but dies before consummating the sale, the supreme court has held that the contract is not treated as an alienation for devise purposes. Thus, an owner with minor children who contracts to sell the homestead but dies before the closing cannot devise the homestead. The court did not discuss whether the decedent intended to reinvest the proceeds if he lived. *In re Estate of Skuro*, 487 So. 2d at 1066.

"While we recognize the doctrine of equitable conversion, because of the unique treatment of the law of homestead property, we find that doctrine inapplicable when the potential vendor is physically residing on the property as his home at the time of his death. Had Skuro abandoned possession and no longer claimed it as his family's place of abode, the doctrine would likely apply.

*Id.*

the sale. A judgment creditor's remedy would be to reach the proceeds, after the closing, once the proceeds are in the hands of the seller. On the other hand, if the sale is treated as an abandonment or alienation, a judgment that could not attach to the homestead while it was the residence of the owner could attach to the property at the time of the contract or sale. If a sale constitutes an abandonment, then a related question is whether a gift of the homestead also could be treated as an abandonment.

Clearly, a sale is not an abandonment or alienation of the exemption if the owner intends to reinvest the proceeds in another homestead within a reasonable time. Further, the proceeds are exempt if they are not commingled and the owner intends to reinvest them and does so within a reasonable period of time. But is the converse true? Is a sale an abandonment if the owner does not intend to reinvest the proceeds of the sale? The supreme court has not ruled on this issue. In *Beensen v. Burgess*,<sup>283</sup> the Fourth District held that a seller who vacated his homestead before a closing in order to surrender possession of the property at closing had not abandoned the homestead. In *Beensen*, the seller temporarily resided with his daughter until the closing; but, it was unclear whether the seller reinvested the proceeds in another homestead. *Beensen* was followed by the federal district court in *Brown v. Lewis*.<sup>284</sup> In *Brown*, the owner of a homestead signed a contract to sell and then permanently moved to Michigan two months prior to the closing. The court held that she had not abandoned the property when she moved. Thus, the property retained its exempt status and the buyer's title was not subject to a lien for a judgment against the seller. Neither court discussed the seller's intention to reinvest the proceeds; however, in *Brown v. Lewis*, the owner established permanent residency in Michigan and could not claim the intent to reinvest the proceeds in a Florida residence.

The law should be clarified as to whether these cases are correct. If these cases are correct, a buyer has no obligation to satisfy a judgment against the seller if it is not a valid lien against the homestead, and the buyer will receive title free from those judgments. The burden is on the creditor to attach the proceeds once they are in the hands of the seller.

If these cases are correct, consideration should be given to whether this rule should be changed to grant a creditor the right to be paid at closing if the seller does not intend to reinvest the proceeds. If the seller intends to reinvest the proceeds, consideration should be given to whether the proceeds

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283. 218 So. 2d 517 (Fla. 4th Dist. Ct. App. 1969).

284. 520 F. Supp. 1114 (M.D. Fla. 1981).

should be held in escrow. This would place a significant burden on the escrow agent. The proceeds would be held in escrow for a reasonable period of time and during that time could be disbursed only for the purposes of reinvesting them in a new homestead. Once the reasonable time period for reinvesting expired, any remaining proceeds would be used to satisfy the creditors' judgments.

Satisfying creditors out of sale proceeds would protect creditors. On the other hand, it would place a burden on the homeowner to prove non-abandonment (i.e., an intent to reinvest), a burden on the buyer to assure that the judgments were satisfied or the proceeds properly escrowed, and a burden on an escrow agent. This would unduly burden homestead owners, buyers, and commerce, when the creditor presently has an adequate remedy. The burden under present law is on the creditor to find and reach the nonexempt proceeds. There does not seem to be any compelling reason to shift the burden, when present law allows the creditor to reach the nonexempt proceeds.<sup>285</sup>

#### *e. Creditors with Dischargeable Debts Under Bankruptcy*

When a homeowner files a petition in bankruptcy or is involuntarily placed there, the rules change. The homeowner can claim the state exemption in bankruptcy. The creditors may be satisfied, in whole (rarely) or in part out of nonexempt, unsecured assets of the estate. To the extent a creditor is not paid in full, the debt is discharged unless the debt is not dischargeable in bankruptcy.

If the debt is not dischargeable, the homeowner remains liable for the debt. Then, if the homeowner sells the exempt homestead with no intent to reinvest the proceeds, the creditor could reach the sales proceeds. In addition, in some cases, the homestead may be liable for some of the owner's debts; either because the debt is secured by a nonavoidable lien<sup>286</sup> or the debt is a certain type of nondischargeable debt.<sup>287</sup>

Most debts are dischargeable.<sup>288</sup> This means that after the discharge,

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285. Ch. 93-256, § 5, 1993 Fla. Laws 2497, 2499 (to be codified at FLA. STAT. § 222.30(2)).

286. Present bankruptcy law allows a debtor who claims a homestead under Florida law to avoid a pre-existing judicial lien if the lien attached after the debtor acquired his or her interest in the property under 11 U.S.C. § 522(f)(1) (1992). *Owen v. Owen*, 500 U.S. 305 (1991). This is a problem under bankruptcy law that Florida law cannot address.

287. 11 U.S.C. §§ 522(c)(1), (3) (1992).

288. *Id.* § 523.



the homeowner no longer has these debts.<sup>289</sup> Thus, the homeowner can sell the homestead and keep the proceeds free from the claims of the discharged creditors. It even means that a homeowner can contract to sell the home before the petition is filed and still claim the homestead exemption.<sup>290</sup>

If the debt is not dischargeable, a person who stacks a bankruptcy discharge on top of the homestead exemption can reap great benefits from it. This benefit would be obtained by contracting to sell the homestead, either before or after the bankruptcy petition is filed, and closing the sale after the petition is filed.<sup>291</sup> If the property is exempt, the trustee should have no reason to avoid the contract to sell.

The problem that needs to be addressed is the fact that a discharge precludes the creditor from reaching the sales proceeds. If the claim of a "temporary" exemption coupled with a bankruptcy discharge results in this type of abuse, the creditor should have a remedy, such as denial of the exemption or revocation of the discharge. One question is whether this abuse can be corrected by a change in Florida law. Permanent residency is a requirement for the Florida homestead exemption. Permanent residency does not mean that a person cannot sell the homestead. It means that the person must intend to make that home (or a substitute home) his present, permanent residence. A voluntary sale after the exemption is claimed may raise a question as to whether the prerequisite intent existed at the time the exemption was claimed. Similarly, the execution of a contract to sell before the exemption is claimed raises a question as to whether the prerequisite intent existed. In this context, the question of permanent residency, abandonment, and alienation really are the same issue. In a non-bankruptcy context, the creditor is protected by its right to reach the proceeds. In the bankruptcy context, the discharge cuts off these rights. Could Florida establish a different rule regarding permanent residence and abandonment

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289. If the debt is secured by a valid lien, the discharge means that the debtor is relieved of personal liability for the debt; however, the lien secures a nonrecourse liability.

290. *In re Crump*, 2 B.R. 222 (Bankr. S.D. Fla. 1980). In *Crump*, the homestead was exempt on the petition date (November 27, 1979), even though the debtor entered into the contract to sell (November 1, 1979) and even though the debtor intended to leave the house the day after the petition was filed "to reside at least temporarily in a rented house, which they would like to purchase but have no present prospect of being able to purchase." *Id.* at 223.

291. *See id.*; *see also In re Washofsky*, 78 B.R. 347 (Bankr. S.D. Fla. 1987) (homestead was exempt as of date petition was filed, even though debtor vacated the property after petition was filed and moved into a rental apartment, and homestead was under contract for sale).

when the exemption is claimed in bankruptcy as opposed to when it is claimed in a nonbankruptcy proceeding?<sup>292</sup> Assuming that Florida could do this, it does not seem desirable. If the bankruptcy exemption were more desirable, it would provide an incentive for the debtor to file a voluntary petition. If the bankruptcy exemption were less desirable, it would provide an incentive for a qualifying creditor to file an involuntary petition. Present bankruptcy law contains some of these incentives, but that is not sufficient reason for Florida law to contain more incentives. In addition, changing the rules could affect debtors that need their homesteads and have no intention to sell them after bankruptcy.

Accordingly, the Florida courts need to resolve the issue of whether the intent to sell without reinvesting the proceeds constitutes an abandonment as of the sale.<sup>293</sup> Then, the bankruptcy issue needs to be addressed with regard to whether the debtor can claim the exemption and receive the proceeds, free from any liability to those creditors.

### B. *Transfer Provisions*

The devise provisions were revised in 1968 to limit the protected class of children to minor children.<sup>294</sup> They also were revised in 1972 to allow a devise to the spouse (one protected class), in the absence of any minor children (the other protected class). If devise is prohibited because there is a minor child, however, the statutory descent provisions extend a benefit to adult children. In addition, the 1984 extension of the exemption to all natural persons increased the number of homesteads. It extended protection to the spouse and heirs of natural persons who were not heads of a family. Thus, it increased the number of spouses who can be protected and the number of heirs who can benefit from the decedent's exemption. Several supreme court decisions after these revisions and amendments reflect inconsistencies between the purpose for the transfer restrictions and inurement of the exemption and the results of these provisions. An inconsistency arises when those who reap the benefit of these provisions do so to the detriment of the decedent's creditors. These cases and inconsisten-

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292. Maryland has a homestead exemption, limited in value, that differs for bankruptcy and nonbankruptcy proceedings. The value is \$5000 in a bankruptcy proceeding and \$3000 in a nonbankruptcy proceeding. MD. CTS. & JUD. PROC. CODE ANN., § 11-504 (1989).

293. Determining that the abandonment occurred immediately preceding the sale would prevent creditors from forcing the sale of the homestead. If the sale is an abandonment, then the question of when a creditor's lien attached would be relevant, if there were several creditors and insufficient funds to satisfy them all.

294. FLA. CONST. art. X, § 4(c).

cies will be discussed in the context of how the transfer provisions should be reformed.

When considering reform, it is important to consider the impact of the supreme court's decision in *Shriners Hospital for Crippled Children v. Zrillic*.<sup>295</sup> In *Shriners*, the court held that an individual's right to "acquire, possess and protect property" is protected by the constitution of Florida<sup>296</sup> and that right includes the right to devise. It also includes the right to dispose of property during lifetime. Obviously, the constitutional right to alienate or devise property may be restricted by another provision of the constitution. Further, "constitutionally protected property rights are not absolute, and 'are held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order [and] general welfare.'"<sup>297</sup> Nevertheless, in determining whether the present transfer provisions are desirable, it is helpful to view them from the standpoint that the right to alienate and devise property is a basic protected property right, and it should be restricted only to the extent necessary to secure the general welfare of the people. Thus, the right to alienate or devise homestead should be restricted only to the extent necessary to protect the persons the exemption is designed to protect.

In *Shriners*, the supreme court also stated that "Florida law is replete with protections for surviving family members who may have been dependent on the testator. For example, the Florida Constitution expressly provides protection in the form of homestead exemptions for real and personal property . . . ."<sup>298</sup> It should be noted that the present homestead exemption provides protection for surviving family members, whether or not they are dependent on the homestead for shelter.

The transfer provisions affect a married person's right to alienate or devise his or her homestead. They do not affect a parent's right to alienate the homestead, even if that parent has a minor child, unless the parent is

295. 563 So. 2d 64 (Fla. 1990).

296. Article I, section 2 of the Florida Constitution provides:

SECTION 2. Basic rights.—All natural persons are equal before the law and have inalienable rights, among which are the right . . . to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited.

297. *Shriners*, 563 So. 2d at 68. (quoting *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976)).

298. *Id.* at 69. See also FLA. CONST. art. X, § 4; FLA. STAT. §§ 732.401-732.4015 (1985).

married. They do, however, prevent the parent of a minor child from devising the homestead at death. Should these provisions be retained or amended? To determine this, it is necessary to analyze the purposes of these provisions and the effect of these provisions.

### 1. *Inter Vivos* Provisions

The requirement for spousal consent for an inter vivos alienation has applied since 1868.<sup>299</sup> Originally, this requirement applied only to a married owner who was head of a family. Thus, only a spouse married to the head of a family was protected by this provision. The purpose of this provision was to protect the spouse who was part of the family but did not own the homestead. In most cases, the husband was the head of the family, and the wife resided there with her husband and needed the shelter of the homestead. The constitution protected this wife from her husband transferring or mortgaging the homestead without her consent. If the wife did not reside with her husband, then he usually was not the head of the family and the property did not qualify as homestead. The joinder provision also protected a husband if the wife owned the home and she was the head of the family.

In some cases, the constitution protected a spouse of the head of the family, when the spouse did not reside on the homestead or was not part of the family. For example, a spouse who had temporarily or involuntarily abandoned the homestead was protected from the other spouse alienating the homestead without his or her consent. Thus, if the husband owned the homestead and the wife abandoned the homestead because he physically abused her, a court probably would have ruled that he was the head of the family and could not convey it without her consent. On the other hand, if the wife had voluntarily and permanently abandoned the husband and the homestead, the result was less clear. If the husband was the head of the family, which included his children, the court had the equitable power to waive the joinder requirement if the wife voluntarily abandoned him and the children.<sup>300</sup> This doctrine of spousal abandonment was part of the law in effect, when the owner was required to be the head of the family in order

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299. One difference in the present constitution is that it specifically authorizes gratuitous transfers. FLA. CONST. art. X, § 4(c). Another difference is that the Florida Constitution of 1885 required a deed or mortgage to be duly executed, resulting in a requirement for two subscribing witnesses to a contract to purchase, which has been eliminated. See FLA. CONST. of 1885, art. X, § 4.

300. See *In re Estate of Scholtz*, 543 So. 2d 219, 220 (Fla. 1989) (regarding its characterization of the pre-1985 caselaw).

to qualify for the homestead exemption.<sup>301</sup>

In 1984, the homestead exemption was amended to apply to any natural person owning a homestead. Since then, any spouse married to a natural person owning a homestead is protected. This amendment substantially changed the classes of spouses that can prevent a homeowner from alienating it by extending protection to spouses of natural persons who are not the head of a family. The spouse of any person who owns a homestead is protected, whether that person is the head of the family and whether the homestead is that spouse's residence.

Consider the following example: A husband owns the home in which he and his wife reside. He and his wife are the sole members of the family, and he is the head of the family. The wife abandons him and the home and moves to another state, with no intention of returning to him or the home. Thereafter, the husband is no longer the head of the family. If the abandonment occurred in 1984, the home would not be a homestead and the husband could sell or mortgage the home without her consent. If the abandonment occurred after January 7, 1985, the home would be a homestead and the husband could not sell or mortgage the home without his wife's consent, unless the marriage has been dissolved.<sup>302</sup> Thus, under the present law, a spouse is protected from alienation, even if he or she does not reside on the homestead and has abandoned the owner-spouse and the homestead.

In many cases, the nonowner-spouse is dependent on the owner-spouse for shelter and support. This nonowner spouse needs the protection accorded him or her under the constitution to prevent the owner from alienating the homestead without his or her consent. If the home is owned by both spouses as tenants by the entireties, both spouses are protected. Neither can alienate the property without the other's consent. But if only one spouse owns the home, the other may need protection. The joinder requirement should be retained to protect that owner's spouse. The question is whether the joinder requirement should apply to all spouses.

The joinder requirement for a married owner should not be abolished entirely.<sup>303</sup> It should be retained, but only for a limited class of spouses.

301. See *Barlow v. Barlow*, 23 So. 2d 723 (Fla. 1945) (regarding devise restriction).

302. See *In re Estate of Scholtz*, 543 So. 2d at 219 (concept of spousal abandonment does not apply to devise restriction, so that husband who was survived by a spouse who lived separately from him for 29 years, was not entitled to devise homestead that he purchased during their separation).

303. If the choice is to have the restriction apply to all nonowner spouses or to none of them, then its present scope should be retained so that it applies to all spouses.

Thus, the joinder requirement should apply to spouses whose permanent residence is or was the homestead, so long as that residence has not been voluntarily and permanently abandoned by that spouse.

A spouse who has never resided in the homestead or who resided there and then voluntarily abandoned it as a permanent residence does not need protection. That spouse can choose to remain married or dissolve the marriage and divide the assets, including the homestead. Consider the example of an estranged husband and wife with no children. Neither has attempted to have the marriage dissolved. Each owns and lives alone in a separate homestead. Neither relies on the other for support or has any contact with the other. Neither of them can give, mortgage, or sell their respective homesteads without the other's consent (except to create a tenancy by the entirety). Neither spouse should have the right to prevent the other from alienating his or her homestead.

The purpose of the joinder requirement should be to provide a spouse who chooses to reside in the homestead with the security that the homestead will not be alienated without that spouse's consent. If the spouse lives in the home and the nonowner chooses to abandon it, that home still would be the owner's homestead and the joinder requirement should apply.

The joinder requirement should not apply to other spouses. Accordingly, the law should provide that the right to prevent the owner spouse from alienating the homestead, without the other nonowner spouse's consent, can be waived by the nonowner spouse. Permanent, voluntary abandonment of the homestead by the nonowner spouse would operate as a waiver of the joinder requirement. In addition, this requirement should be waivable by agreement between the spouses. The requirements for the waiver agreement could parallel the requirements for an agreement to waive the right to inherit the homestead or they could parallel the requirements for other provisions of an antenuptial agreement.<sup>304</sup> Waiver of the right to inherit restores the right to devise the homestead to a married owner who has no minor children.<sup>305</sup> Similarly, waiver of the right to join in an alienation should restore the right of a married person to freely alienate the homestead during lifetime.

An unmarried parent can alienate his or her homestead, even if he or

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304. Compare FLA. STAT. § 732.702 (1991) (no consideration required; disclosure required only if the agreement is made after the marriage) with *Del Vecchio v. Del Vecchio*, 143 So. 2d 17, 20 (Fla. 1962) (the requirements for an antenuptial agreement are that it must contain fair and reasonable provisions for the waiving spouse or the waiving spouse must receive full, fair and open disclosure of the other spouse's wealth).

305. *City Nat'l Bank v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991).

she has minor children. By contrast, that parent cannot devise the homestead, if he or she is survived by any minor children. At first, this appears to be inconsistent, but it is not. The laws regarding parental support are designed to protect the minor child while the parent is alive. The parent needs the ability to purchase or sell the homestead in order to determine the appropriate means of providing a shelter for that minor child. The parent's ability to alienate the homestead should not be restricted when that parent has a minor child.<sup>306</sup> The restriction on alienation should apply only when the owner is married, regardless of whether the owner has any minor children; however, the restriction should not apply if the spouse has waived the homestead rights by abandonment or agreement.

## 2. Devise Provisions

The original purpose of the devise prohibition was to protect the widow and children of the head of the family. Now, the devise prohibition is designed to protect a widow, a widower, or only a minor child, but not an adult child. The constitution prohibits devise, but it does not guarantee that the homestead will descend to the protected class, nor does it necessarily guarantee the protected class the exclusive right to reside in the homestead. The legislature fills in this gap, by determining how the homestead will descend. To determine if the prohibition on devise should be maintained, it is essential to consider how the homestead descends when devise is prohibited. If the descent provisions do not benefit the members of the protected class, then they should be amended. If they cannot be amended to do this effectively, then the prohibition on devise should be revised.

The devise prohibition only applies when the owner's interest is one

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306. Any proposal requiring that a minor child consent to the alienation, through his or her natural or legal guardian or guardian ad litem, would be inappropriate or unduly burdensome. If the child lives with the parent who owns the homestead, that parent will provide shelter for the child, be it this homestead or another home. If the child does not live with the parent who owns the homestead, why should that child have the right to prevent the parent-owner from selling that home? In addition, if the owner is the child's guardian, there is no reason to require the owner to consent in his or her capacity as guardian. Further, there is no reason to require a guardian ad litem to be appointed. Even if the guardian ad litem could make an informed decision as to what is in the best interests of the minor child, the owner's decision as to what is in the best interest of the owner and child should override the guardian ad litem's decision. If the child does not reside with the owner, the owner's former spouse or the child's other parent (if the child was born out of wedlock) could be the child's guardian. Requiring that guardian's consent would be problematic. If the owner is married and has a minor child, the spouse's joinder should be the only joinder requirement, even if that spouse is not the child's other parent.

capable of being devised. Thus, the devise prohibition does not apply if the homestead is owned as a tenancy by the entirety or a joint tenancy with right of survivorship. It also does not apply if the owner has only a life estate or a beneficial life interest in an irrevocable trust.

When the owner has a devisable interest but devise is prohibited under the constitution, the homestead descends pursuant to the Florida Probate Code. The surviving spouse receives a life estate and the descendants (including any minor child) a vested remainder. If there is a surviving spouse or descendant, but not both, the homestead descends to the surviving spouse or descendants, as the case may be. The minor child is not granted possession of the homestead so long as the surviving spouse is alive. If the surviving spouse is the minor child's other parent or guardian, the child will live with the spouse on his or her life estate. Further, if there is no surviving spouse or the surviving spouse dies, the minor is not granted exclusive possession if there are other descendants. Instead, ownership and possession are shared with the other descendants, per stirpes. In addition, the minor will reside in the home only if the child's guardian also resides there. One result of these provisions is that adult children are treated differently depending on whether the owner is or is not survived by a surviving spouse or a minor child.

In recent years, there have been legislative proposals to remove all of the devise prohibitions. However, the devise prohibition is an integral part of the homestead protection and should be retained in some fashion to protect the surviving spouse. Whether the prohibition against devise should be retained if the owner is survived by a minor is questionable and is discussed *infra*.

When the constitution was revised in 1968, adult children lost their status as members of the protected class. An adult child has no right to prevent the parent from devising the homestead.<sup>307</sup> An adult child has a statutory right to inherit an interest in the parent's homestead, if the parent cannot devise it or chooses not to devise it. This lack of standing is reflected in two decisions of the supreme court.

In *In re Estate of Finch*,<sup>308</sup> the Supreme Court of Florida held that the owner of a homestead who is survived by a spouse and adult children and who wants to devise the homestead has only one choice: the owner can

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307. Upon the death of the parent, an adult child could contest an *inter vivos* alienation, if the parent was married and the spouse was required to join in the alienation but failed to do so.

308. 401 So. 2d 1308 (Fla. 1981).



devise a fee simple interest in the homestead to the surviving spouse.<sup>309</sup> Otherwise, the homestead will descend by statute, with the surviving spouse receiving a life estate and the descendants (adult children) receiving the vested remainder. In *Finch*, the husband owned the homestead and he wanted to devise a life estate to his wife and a vested remainder to only one of his two adult daughters. The court held that “[w]here a testator dies leaving a surviving spouse and adult children, the property may not be devised by leaving less than a fee simple interest to the surviving spouse.”<sup>310</sup>

In *City National Bank v. Tescher*,<sup>311</sup> the court held that a married person with adult children, but no minor children, could devise the homestead when the surviving spouse waived homestead rights in an antenuptial agreement.<sup>312</sup> This decision was followed by *Hartwell v. Blasingame*,<sup>313</sup> which held that the surviving spouse’s waiver was binding on the adult children, so that they could not contest their parent’s devise of the homestead.<sup>314</sup> Accordingly, if a surviving spouse has waived the right to inherit an interest in the homestead, the owner has the right to devise the homestead if there are no minor children. The waiver is equivalent to the spouse’s death, so the owner is treated as not being survived by a spouse.

The reason the owner cannot devise the homestead when survived by a spouse or minor child is premised on the assumption that the spouse and minor child need the shelter that the homestead can provide them. The surviving spouse can be protected by providing a life estate to that surviving spouse. A surviving minor child can be protected by providing the minor with a term interest during his or her minority.

If there is a surviving spouse and minor child, it is not possible to guarantee both of them possession of the homestead. If the surviving

309. *Id.* at 1309. If the owner is a tenant in common, so that the owner’s homestead interest is an undivided interest in the property, then the owner can devise that undivided co-tenant interest to the surviving spouse. See also *supra* notes 139-40 and accompanying text (regarding a devise to the spouse of an interest as a tenant in common).

310. *Finch*, 401 So. 2d at 1309.

311. 578 So. 2d 701 (Fla. 1991).

312. *Id.* at 703. In *Tescher*, the wife owned the homestead and her husband waived his rights by an antenuptial agreement. The wife was survived by two adult children and four adult grandchildren, and the homestead was not specifically devised. The personal representative wanted to sell the homestead and distribute it as part of the residuary devise. The probate court’s order authorizing the sale was affirmed by the district court and the supreme court. *Id.*

313. 584 So. 2d 6 (Fla. 1991).

314. *Id.* at 7. In *Hartwell*, there were no minor children. *Id.* at 6.

spouse is the minor child's parent or guardian, the child will be protected by that spouse or guardian rather than by the homestead law. If the surviving spouse is not that child's parent or guardian, the surviving spouse's right to possession should be superior to the minor child's. Accordingly, if the surviving spouse receives a life estate, the minor's term interest would not begin until the surviving spouse died, and then it would begin only if the surviving spouse died while the child was still a minor. If there were no surviving spouse, the minor child's term would begin when the owner died and would cease when the child attained the age of majority or died prior thereto. If there were several minors and they did not want to share possession, the homestead could be offered for rent, with any rental income shared by the minors and used by their guardians to provide substitute housing. The life estate and term interest would be alienable by the surviving spouse and minor child (via guardian), respectively. Thus, the surviving spouse and minor child can be protected without granting all descendants a remainder interest in the homestead.

If the surviving spouse is the minor child's other parent, the minor child does not need to receive a term interest when the owner dies. Instead, the owner of the homestead should be able to devise the homestead to the surviving spouse. If this occurs and the surviving spouse resides there, it will be the surviving spouse's homestead. Then, the minor child will be protected by the homestead laws, when the surviving parent dies during the minority of that child.

A life estate or term interest is sufficient to protect a surviving spouse or minor child, respectively. There is no reason that the owner should not have the right to devise a remainder interest in the homestead as he or she pleases. This remainder would be subject to the life estate of the surviving spouse, if any, and to the term interest for the minor child or children, if any.

The constitution and statutes should be amended so that the surviving spouse receives a life estate, minor children receive a term interest, and the remainder interest can be devised as the owner chooses.<sup>315</sup> The remainder would default to the owner's lineal descendants to the extent not devised otherwise. This amendment will overcome the result of *Finch*.<sup>316</sup> The present law grants an adult child a right to inherit if there is a surviving

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315. A minor's term interest should qualify as a homestead if the life estate qualifies and the minor resides with the life tenant. The same should apply to the remainder interests if the holder of that interest resides with the holder of the possessory interest, be it the life estate or the term interest. See *supra* part II A.1.c.vii. (regarding remainder interests).

316. 578 So. 2d at 701.

spouse—a right that the adult child would not have if there were no surviving spouse. This amendment will avoid that result unless the owner wants that result and chooses not to devise the homestead.

The owner could devise a contingent or vested remainder interest. For example, the decedent could choose to vest the remainder interest in the surviving spouse, in order to give that spouse the right to dispose of the property or remainder once the child attains the majority. The remainder interest could be vested in an adult child if the owner chose to do so. Or the remainder interest could be vested in any other person or entity the owner chooses. Or the remainder interest could be contingent upon the occurrence of certain events or the remainder beneficiary surviving the life estate or term interest.

The owner should not be able to create successive life estates, granting a married adult child a residence for life and thereby avoiding the homestead rights the surviving spouse of the married child might have in the residence. The owner should not be able to impose a restriction that would prevent the remainder beneficiary from alienating or devising it. To the extent the remainder interest qualifies as a homestead, that owner's spouse and minor child should receive the full protection accorded them under the homestead laws.

Consideration also should be given to allowing devises in trust. This would allow the owner to devise a life estate and term of years in trust. A new trust form, a qualified homestead trust ("QHOT") could be established for this purpose. The QHOT would provide the surviving spouse with the exclusive right to use the homestead during his or her life. The spouse would have the right to direct the trustee to rent the homestead to others during the surviving spouses lifetime. If it were rented, the spouse would be entitled to the net income. The trustee would have the obligation to maintain the homestead, but only to the extent there were adequate funds available for this purpose. Funds could be provided from rental income, by the surviving spouse or trust funds provided by the decedent. The trustee would have the right to sell the homestead, with the surviving spouse's consent.<sup>317</sup> The trustee would have the right to reinvest the proceeds in

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317. Should the remainder beneficiaries be granted a right of first refusal? This would give them the right to purchase the homestead at the price and upon the terms presented in a bona fide offer for the homestead. If a remainder beneficiary were a minor, this would require the appointment of a guardian ad litem, which is one of the problems associated with the present statutory life estate and vested remainder. Further, the right of first refusal could affect the trustee's ability to sell the homestead and close when the buyer would want, particularly if there are comparable properties for sale without that right. Thus, the protection

a new homestead, with the surviving spouse's consent. If there were a mortgage on the homestead, the surviving spouse would be required to pay the interest on the mortgage and the remainder beneficiaries the principal.<sup>318</sup> If any beneficiary advanced funds for another beneficiary's share of the expenses, that beneficiary would be entitled to recover the funds advanced, plus interest, from any sale of the homestead and possibly a lien against that beneficiary's interest. A beneficiary could serve as the trustee. After the surviving spouse died and all minor children had attained the age of majority or had died, the homestead would be distributed, outright, to the remainder beneficiaries. The QHOT should be designed so that it can qualify for the marital deduction, as qualified terminal interest property.<sup>319</sup>

An additional question is whether all surviving spouses should be granted protection against disinheritance. It is arguable that a spouse who has never resided on the homestead or who voluntarily abandoned it is not entitled to that protection.

In *Barlow v. Barlow*,<sup>320</sup> the supreme court held that a surviving wife was not entitled to any interest in her husband's homestead when she had abandoned her husband and the home prior to his death. Ms. Barlow removed her effects from the home, voluntarily and permanently left it, and moved to another city where she retained counsel to procure a divorce. The abandonment occurred within two weeks of the husband's death, while his death was imminent. This case was decided when the head of the family requirement existed. It was decided on one of two grounds: either that the husband no longer was the head of the family, consisting of his wife and himself, or that it would be inequitable to allow the wife to abandon the husband and then return after his death to claim an interest in his homestead.<sup>321</sup>

In 1988, the issue of whether "the concept of abandonment as set out in *Barlow v. Barlow* [is] still viable in view of the 1985 amendment of the homestead provisions of the Florida Constitution" was certified to the supreme court.<sup>322</sup> In *In re Estate of Scholtz*,<sup>323</sup> the husband and wife had been separated for twenty-nine years and he had purchased the

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that the right of first refusal could provide appears to be outweighed by the detriments.

318. Whether a burden should be imposed on the term interest of a minor would need to be decided.

319. I.R.C. § 2056(b)(7).

320. 23 So. 2d 723 (Fla. 1945).

321. *Id.* at 724.

322. *In re Estate of Scholtz*, 525 So. 2d 516, 516 (Fla. 4th Dist. Ct. App. 1988).

323. 543 So. 2d at 219 (Fla. 1989).

homestead while they were separated. They filed joint income tax returns, but "there was no familial support between them," "no domestic relationship," and "no evidence of any reconciliation."<sup>324</sup> The court held that the "concepts of abandonment and inequity that were part of the cases predating the 1985 amendment all related to the definition of homestead which contemplated a 'head of the family.'"<sup>325</sup> Accordingly, the supreme court held that spousal abandonment of the homestead does not prevent that spouse from receiving an interest in the homestead. Therefore, the restrictions against devise applies to a married owner who has been abandoned by his or her spouse, unless the spouse has waived homestead rights in a valid agreement.

The effect of the extension of the exemption to all natural persons is that a married owner must provide his or her surviving spouse with a residence (for the survivor's life or in fee), unless the surviving spouse waives that right. Under present law, this right can be waived by agreement, without consideration.<sup>326</sup> It can be waived without any disclosure, if the agreement is made prior to the marriage,<sup>327</sup> but it cannot be waived by abandonment. This result should be changed. A spouse who voluntarily abandons the homestead or chooses never to reside there should not be granted a life estate in that homestead when the owner-spouse dies.

The purpose for the Florida homestead law does not mandate that all spouses should be protected against disinheritance. When the exemption was extended to any natural person, the class of protected spouses was expanded unnecessarily.<sup>328</sup> If the homestead is the permanent residence of the nonowner spouse, that spouse deserves the protection the constitution accords him or her. If the homestead is owned as a tenancy by the entirety,

324. *In re Estate of Scholtz*, 525 So. 2d at 517.

325. *In re Estate of Scholtz*, 543 So. 2d at 221.

326. FLA. STAT. § 732.702 (1991).

327. *Id.*

328. The Background Papers for the Constitutional Revision Commission of 1977-78 indicate that deleting the head of the family requirement "would alter the policy behind the art. X exemptions; namely to protect the owner's dependents." *Background Papers, Constitutional Revision Commission 1977-78*, at 3 (copy on file at the Nova Law Review office). This report, however, does not discuss the devise provisions in connection with this change. In *In re Estate of Scholtz*, 543 So. 2d at 221, the supreme court noted:

While we may have some doubt about whether the proponents of the amendment considered its effect as related to the prohibition against the devise of homesteads, we are unable to state with any certainty that they did not intend the surviving spouse and the children to receive the homestead regardless of whether the family unit continued to exist at the time of the owner's death.

that spouse will be protected. A spouse who is financially unable to purchase a home in his or her own name or in a tenancy by the entirety or who is unable to convince the other spouse to create a tenancy by the entirety needs protection. But a spouse who has permanently and voluntarily abandoned the homestead does not.

The homestead law should be amended, so that the right to inherit an interest in the homestead can be waived by agreement or abandonment. Waiver by agreement has been sanctioned by the supreme court and is codified in the current probate code. Waiver by abandonment is not part of the present law, according to the supreme court's decision in *In re Estate of Scholtz*.<sup>329</sup> Accordingly, a constitutional amendment is required to make it part of the homestead laws. Waiver by abandonment would arise if a spouse failed to make the homestead his or her permanent residence during the owner's lifetime or had voluntarily and permanently abandoned it prior to the owner's death.

### 3. Inurement of Exemption

If creditors cannot reach a person's homestead while he or she is alive, should they have a last chance when he or she dies? This issue arises if the decedent owned an interest in the homestead as the sole owner, as a co-tenant, or as a beneficiary of a revocable trust.<sup>330</sup>

In *Public Health Trust v. Lopez*,<sup>331</sup> the supreme court held that the decedent's exemption inures to the heirs of any natural person, even when the heirs are not dependent on the decedent.<sup>332</sup> The court noted that "[t]he term 'heirs' is defined by section 731.201(18), Florida Statutes (1985), as those persons entitled to the decedent's property under the statutes of intestate succession."<sup>333</sup> The court applied this rule to heirs who were adult children of the decedent but were not dependent on the decedent at the

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329. 543 So. 2d 219 (Fla. 1989).

330. This issue does not arise if the decedent's interest did not survive his or her death or was the type of interest that passes by survivorship rather than by devise, intestacy or homestead statutes. For example, a life estate terminates when the decedent dies, and the decedent's creditors would have no right to reach the remainder interest. Another example arises when the homestead is owned as a tenancy by the entirety or a joint tenancy with right of survivorship—the surviving spouse or joint tenant receives the property by survivorship and the decedent's interest does not survive for purposes of a sole creditor of the decedent being able to reach it.

331. 531 So. 2d 946 (Fla. 1988).

332. *Id.* at 951.

333. *Id.* at 951 n.6 (citing FLA. STAT. § 731.201(18) (1985)).

time of death. *Lopez* consolidated two cases. In one case, the adult children lived with their mother who owned the homestead. In the other, the adult children lived elsewhere.<sup>334</sup>

Under the present law, the decedent's surviving spouse, minor children, and other descendants who receive an interest in the homestead do so with the benefit of the decedent's exemption. In addition, any other person who inherits the decedent's property if the decedent dies intestate will receive the benefit of the exemption (and will apply it to any interest in the decedent's homestead that the person inherits). Further, the rules are applied when the persons who would inherit the property receive it by devise.<sup>335</sup>

In some cases, the provisions are fair. They are fair if the persons who occupied the homestead while the decedent was alive receive an interest in the homestead and the decedent's exemption inures to them. In other cases, the provisions are not fair. A person who was a member of the decedent's family in law<sup>336</sup> and resided on the homestead, but did not have the right to inherit from the decedent, would not be protected if the decedent died intestate. If the decedent devised the homestead to that family in law, they would receive the homestead but not the exemption. Thus, the homestead will pass through administration, subject to the decedent's creditors. This has always been an anomaly was part of the law when the head of the family requirement existed as well.

Another inequity arises when the spouse or heirs who receive the homestead and the exemption never used the property as their permanent residence. This inequity existed under the old law, but it was less likely to happen. Prior to January 8, 1985, only the head of the family was entitled to the exemption, so only the heirs of the head of the family benefitted from the protection. Now that the exemption has been extended to any natural persons, the exemption inures to the heirs of any natural person with a homestead. Thus, there are more homesteads for more heirs to receive free from creditors. For example, after 1984, an unmarried man who owns a home and lives there alone can qualify for the homestead exemption. If he dies intestate or devises the property to the persons who would be his heirs, they will receive the homestead free from his creditors. If he were survived by his parents, the exemption would inure to them. They would get this protection even though the decedent did not provide them a home during his

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334. *Id.* at 947.

335. *See supra* note 93.

336. For this purpose, a family in law would arise from communal living, if the owner provides that family in law with the shelter of the homestead, whether or not one person was regarded as the head of that family. It would not include bona fide tenants.

lifetime. Prior to the 1984 amendment, he would not have qualified for the exemption, so that his creditors could reach the homestead during his lifetime and upon his death. This creates a windfall to these heirs, at the expense of the decedent's creditors.

The exemption should inure to a person who receives the homestead if the homestead was that person's permanent residence when the decedent died. By contrast, a person who receives an interest in a homestead that was not his or her residence should not receive the benefit of the exemption. For example, an adult son who owns his own home, exempt from his own creditors, should not be able to receive his mother's homestead, free from the reach of her creditors. In addition, the exemption should inure to the persons who resided there and receive an interest in the homestead, even if that person would not be an heir of the decedent under the laws of intestacy. In this way, persons who would not be heirs at law would be protected if they depended upon the owner for shelter, via the homestead.

Another question is whether the exemption should inure to a person who receives the decedent's homestead but does not intend to permanently reside there after the decedent's death or who intends to sell it without reinvesting the proceeds in a new homestead. The inurement of the exemption has never been tied to the spouse or heir establishing that property as his or her homestead. This may have made sense under the head of the family requirement. For example, a spouse or child who was dependent on the decedent for shelter could receive the decedent's homestead, free from the decedent's creditors, even if that person would not qualify as the head of a family after the decedent's death.<sup>337</sup> Under present law, any natural person who owns a homestead can qualify for the exemption if the property is her or her permanent residence. If the constitution is amended so that the exemption inures only to those who used the homestead as their permanent residence, it does not seem necessary to impose the additional requirement that that person must continue to use the homestead as a permanent residence after the owner's death.

### III. CONCLUSION

Florida's homestead exemption is a powerful exemption with a

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337. Florida Statutes, section 222.19 addressed this problem for the surviving spouse by conferring head of the family status on the surviving spouse, even if the spouse lived alone and could not have qualified as head of a family otherwise. FLA. STAT. § 222.19 (repealed 1983).



significant history. The exemption is conferred by the Constitution of the State of Florida and this exemption cannot be amended without the approval of the Florida voters. This exemption does not solve the problem of those who are homeless, because it only benefits those who can afford to purchase and maintain a home. At the same time, it will help prevent homeowners who suffer financial adversity from becoming homeless and assure them shelter while they work to satisfy their creditors or avail themselves of a discharge and fresh start in bankruptcy.

The purpose of the exemption is two-fold; to protect the homestead from the owner's creditors (via lien attachment or forced sale), to protect certain members of the owner's family from the owner (via alienation or disinheritance), and to protect those members from the owner's creditors (via inurement of the exemption). In most cases, the exemption accomplishes these purposes. There is a need for clarification of the law or reform in a few areas.

The major areas of the law that need reform involve the class of persons that is designed to be protected by the exemption. These areas relate to the constitutional restrictions on alienation and devise and the impact of the statutory descent provisions involving the homestead. Reform is necessitated as a result of the changes made to the Florida Constitution in 1968 and 1984. This article suggests a number of alternative reforms, and the following are recommended as the best alternatives:

1. The joinder requirement for alienation by married persons protects all spouses, even when they have never used the homestead as a permanent residence or have voluntarily abandoned it. Extending the exemption in 1984 to all natural persons extended the protection against alienation to all spouses. At the same time, this amendment eliminated the concept of spousal abandonment. The concept of abandonment should be revived so that a spouse who voluntarily and permanently abandons the homestead does not have the right to prevent the owner-spouse from alienating the homestead. In addition, the joinder requirement should be waivable in a manner similar to the way that the devise restriction is waivable. This would extend the supreme court's decision in *City National Bank v. Tescher* to *inter vivos* alienation. In this way, homestead rights could be waived by abandonment or agreement.

2. The devise restriction also should be limited to cases where the owner is survived by a spouse who has not voluntarily abandoned or waived the homestead. This amendment would change the rule adopted by the supreme court in *In re Estate of Scholtz*. Then, the right to inherit an interest in the homestead could be waived by abandonment or agreement, and the right to devise would not be restricted by the existence of a

surviving spouse if his or her rights had been waived. Further, the devise restriction applicable when the owner is survived by a minor child should be limited, so that the survival of a minor child does not prevent the owner from devising the homestead to the surviving spouse if that survivor is also the parent of the minor child. In this way, the restriction would apply when it is desirable to limit the surviving spouse's interest to a life estate in order to protect the minor child who is not the surviving spouse's child.

3. If there is a protected spouse, but no protected minor child, then the surviving spouse should receive a life estate and the minor child a term interest (possessory during minority, but only after the surviving spouse's death).<sup>338</sup> The owner should have the right to devise the remainder as he or she chooses. This would overrule *In re Estate of Finch*. The use of a qualifying homestead trust ("Q-HOT") should be considered, whereby the homestead could be held in trust after the owner's death for the life of the surviving spouse and the minority of any surviving children. This type of trust could be designed so that it could qualify for the marital deduction for estate tax purposes.

To the extent a child or other person receives a future interest in the homestead (for a term or as a remainder interest), that interest should qualify for the exemption if the possessory interest (the life estate or term interest) qualifies for the exemption and the holder of the future interest resides with the owner of the possessory interest in the homestead. This would change the rule adopted in *Aetna Insurance Co. v. Lagasse*.

These changes would require constitutional and statutory amendments. These changes would be consistent with the supreme court's holding in *Shriners*, that the right to acquire, possess, and dispose of one's property is a constitutional right that should be limited only to the extent necessary to promote the general welfare of the people in Florida. Clearly, any constitutional restriction on the devise of homestead would be constitutional; however, any constitutional restriction on devise should be allowed only to the extent there is a compelling need for the restriction. Further, a restriction on devise should be imposed only to the extent the statutes on descent can effectuate the purpose for the restriction.

In addition, the devisees or heirs of the homestead should receive that homestead, free from the claims of the owner's creditors, only when there is a reason that the exemption should shield them from the owner's improvidence or misfortune. Thus, the exemption should inure upon the

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338. Ownership by tenants by the entirety would avoid creation of a term interest at the death of the first spouse.

death of the owner only to the class of persons who need the protection of the exemption. This class should include only the persons whose permanent residence was the homestead at the time of the owner's death. This class could include a person who would not be an intestate heir. A person within this class who voluntarily abandoned the homestead would not be entitled to the protection.

In addition, there is a need for the homestead law to be judicially clarified or amended so that (1) a rural homestead used by the owner's family as a residence qualifies as the owner's homestead; and (2) only one homestead owned by a person can qualify for the exemption.

The constitutional requirement that only an interest in an estate of land can qualify for the exemption should remain. The exemption should be extended legislatively when needed so that the following applies:

1. The homestead exemption for mobile homes attached to land, which the owner has the right to lawfully possess, should be granted by a clear statutory exemption, with specific exemptions similar to those applicable to the constitutional exemption. The extent, if any, to which the restrictions on alienation and devise apply should be determined.

2. The homestead exemption should be extended statutorily to cooperatives, with due regard given to creating specific exceptions and restrictions on alienation and devise.

3. Consideration should be given to creating a statutory exemption for leasehold interests.

Consideration also should be given to creating a statutory or constitutional exemption for personal property reasonably necessary for the use of the homestead as a residence.

Consideration also should be given to curtailing any abusive use of the homestead and the incentive for debtors to move to Florida for this exemption. This may include expansion of the judicial fraud exception for homesteads as well as a proposals to amend the federal bankruptcy laws.

APPENDIX A<sup>339</sup>

Florida Constitution of 1868:  
(effective May 8, 1868)

## ARTICLE IX—HOMESTEAD

Section 1. A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempted from forced sale under any process of law, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon, or for house, field, or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner.

\* \* \* \* \*

Section 3. The exemptions provided for in sections 1 and 2 of this article, shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption, and the exemption provided for in section 1 of this article shall apply to all debts, except as specified in said section, no matter when or where the debt was contracted, or liability incurred.

\* \* \* \* \*

Florida Constitution of 1885:  
(effective January 1, 1887)

## ARTICLE X—HOMESTEAD AND EXEMPTIONS

## § 1. Exemption of homestead; extent

Section 1. A homestead to the extent of one hundred and sixty acres

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339. Note: The underlined portions of the text represent sections added to or changed from preceding version.

of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article.

§ 2. Exemption to inure to widow and heirs

Section 2. The exemptions provided for in section one shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts, except as specified in said section.

§ 3. Exemptions in former constitution; applicability

Section 3. The exemptions provided for in the Constitution of this State adopted in 1868 shall apply as to all debts contracted and judgments rendered since the adoption thereof and prior to the adoption of this Constitution.

§ 4. Homestead may be alienated by husband and wife

Section 4. Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law.

§ 5. Homestead area not reduced by subsequently including in municipality.

Section 5. No homestead provided for in section one shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town, without the consent of the owner.

\* \* \* \* \*

Florida Constitution—1968 Revision  
(effective January 7, 1969)

ARTICLE X—MISCELLANEOUS

Section 4. Homestead—exemptions

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the head of a family:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

\* \* \* \* \*

Florida Constitution—Amended in 1972:  
(effective January 2, 1973)

ARTICLE X—MISCELLANEOUS

The first sentence of article X, section 4(c) was amended to read as follows:

§ 4. Homestead—exemptions

. . .

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. . . .

\* \* \* \* \*

Florida Constitution—Amended in 1984:  
(effective January 8, 1985)

Article X, Section 4(a) was amended in 1984, to change the reference from “the head of a family” to “a natural person.” Art X § 4, as amended reads as follows:

ARTICLE X—MISCELLANEOUS

Section 4. Homestead—exemptions—

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

# Florida's Official English Amendment

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## I. INTRODUCTION

And the whole earth was of one language, and of one speech. . . . And the LORD said . . . let us go down, and there confound their language, that they may not understand one another's speech. . . . So the LORD scattered them abroad . . . and they [never completed the tower] . . . called Babel.<sup>1</sup>

From the time of the Tower of Babel, people the world over have struggled to communicate despite language barriers. In America, where English is the *de facto*,<sup>2</sup> although not official,<sup>3</sup> language of the country,

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1. *Genesis* 11:1-9. According to the Bible, the descendants of Noah began to build a great city, including a tower that would reach to heaven. *Id.* But God did not want the tower completed, so he made the workers speak different languages and then scattered them over the earth. *Id.* The story of the Tower of Babel has been used to explain the origin of languages. 19 THE WORLD BOOK ENCYCLOPEDIA 349 (1988 ed.)

2. English is not only the language spoken most frequently in the United States, but the language of the Constitution and the country's laws as well.

3. The Founding Fathers rejected the establishment of a national language as well as John Adams' proposal for an "American Language Academy" designed to standardize the English language. Hiram Puig-Lugo, *Freedom to Speak One Language: Free Speech and*



governmental policy has historically tolerated the presence of minority languages<sup>4</sup> under the theory that natural societal and economic pressures would force new immigrants to learn English and assimilate into American life.<sup>5</sup>

Since the early 1980's, however, there has been a growing movement to legislate language by requiring people in the United States to learn and use English. This push for language unity has resulted in several state statutes and constitutional amendments designating English as the official language of the particular state.<sup>6</sup>

*the English Language Amendment*, 11 CHICANO L. REV. 35 (1991).

4. However, immigrants must meet literacy requirements in order to become naturalized citizens, with an exception for persons over 50 years old with at least 20 years of United States residency and persons over 55 years old with at least 15 years of United States residency. 8 U.S.C. § 1423 (1988).

5. See Dennis Baron, *Federal English*, in LANGUAGE LOYALTIES 36-37 (James Crawford ed., 1992). This is commonly referred to as the melting-pot theory. See AMERICAN COLLEGE DICTIONARY 759 (1970).

6. The eighteen states that currently have statutes or amendments declaring English to be the official language of the state are as follows:

*Alabama*, in 1990: requiring enforcement by the Legislature and providing for standing to bring suit, ALA. CONST. amend. 509;

*Arizona*, in 1988: prohibiting the use of non-English languages and providing for standing, ARIZ. CONST. art. XXVIII; held to violate the First Amendment, see *Yniguez v. Mofford*, 730 F. Supp. 309, 317 (D. Ariz. 1990), *aff'd and rev'd in part*, 939 F.2d 727 (9th Cir. 1991);

*Arkansas*, in 1987: mandating that the amendment does not prohibit public schools from providing equal educational opportunities to all children, 1987 ARK. CODE ANN. § 1-4-117 (Michie 1987);

*California*, in 1986: requiring enforcement by the Legislature and providing for standing, CAL. CONST. art. III, § 6; found by the attorney general not to prohibit the use of languages in addition to English, see *infra* note 106;

*Colorado*, in 1988: allowing enforcement by the Legislature, COLO. CONST. art. II, § 30a;

*Florida*, in 1988: allowing enforcement by the Legislature, FLA. CONST. art. II, § 9;

*Georgia*, in 1986: merely designating English as the official language, 1986 GA. LAWS 70;

*Hawaii*, in 1978: designating both English and Hawaiian as official languages, but only requiring Hawaiian for public acts and transactions as provided by law, HAW. CONST. art. XV, § 4;

*Illinois*, in 1923: merely designating English as the official language, ILL. ANN. STAT. ch. v, para. 460/20 (Smith-Hurd 1991); held to be purely symbolic, *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575 (7th Cir. 1973);

*Indiana*, in 1984: merely designating English as the official language, IND. CODE ANN. § 1-2-10-1 (West 1988);

*Kentucky*, in 1984: merely designating English as the official language, KY. REV. STAT. ANN. § 2.013 (Michie/Bobbs-Merrill 1985);

On November 8, 1988, Florida voters overwhelmingly approved a controversial "Official English" amendment<sup>7</sup> to the state constitution.<sup>8</sup> The Official English amendment declared that "English is the official language of the State of Florida . . . . The legislature shall have the power to enforce this section by appropriate legislation."<sup>9</sup> Supporters of the amendment applauded its passage as "sending a clear message to government to conduct its business in English."<sup>10</sup> Opponents, however, charged that the amendment was driven by anti-Hispanic sentiments and that it advertised Florida as a land of bigots.<sup>11</sup>

Despite the amendment's landslide victory, the Florida legislature has

*Mississippi*, in 1987: merely designating English as the official language, MISS. CODE ANN. § 3-3-31 (1991);

*Nebraska*, in 1920: requiring all official proceedings, records, and publications to be in English, and English to be used in all public and private schools, NEB. CONST. art I, § 27;

*North Carolina*, in 1987: mandating that the section is meant to preserve and protect the English language, and not to supersede any state or federal constitutional rights, N.C. GEN. STAT. § 145-12 (1992);

*North Dakota*, in 1987: merely designating English as the official language, N.D. CENT. CODE § 54-02-13 (1987);

*South Carolina*, in 1987: mandating that no law shall require the use of any non-English language except as required for state employment or educational purposes, S.C. CODE ANN. §§ 1-1-696 to 1-1-698 (Law. Co-op. 1991);

*Tennessee*, in 1984: requiring governmental communications and public school courses to be in English, TENN. CODE ANN. § 4-1-404 (1992);

*Virginia*, in 1981: mandating that school boards have no obligation to provide classes in languages other than English, VA. CODE ANN. § 22.1-212.1 (Michie 1992).

7. For purposes of this note, a distinction will be made between Official English and English-only legislation. English-only legislation specifically *excludes* the use of languages other than English, while Official English legislation declares English to be the official language and may or may not provide for enforcement of that declaration. The distinction is often blurred, however. Because enforcement provisions are often vague, it is not always easy to classify a particular amendment or statute as English-only or Official English legislation. See, e.g., Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989); Laura A. Cordero, *Constitutional Limitations On Official English Declarations*, 20 N.M. L. REV. 17 (1990).

8. Maya Bell, *State Gets an Official Language — English*, ORLANDO SENTINEL, Nov. 9, 1988, at D4.

9. FLA CONST. art. II, § 9. It should be noted that the amendment only permits, rather than directs, legislators to enforce the amendment. Since the concept of a standardized national language was rejected by the Founding Fathers, see *supra* note 3, the question remains as to how and by whom "official English" would actually be defined.

10. Bell, *supra* note 8.

11. *Id.*

as yet declined to pass any legislation to enforce it.<sup>12</sup> However, on May 18, 1993, the 13-year-old English-only ordinance of Dade County, Florida was repealed.<sup>13</sup> The repeal of this 1980 forerunner to the Official English amendment unleashed a new determination to put "teeth" into the amendment.<sup>14</sup> The current influx of Haitians into South Florida may further fuel this determination.<sup>15</sup> Attempts to enforce the Official English amendment, however, raise issues of constitutional and statutory legality, depending on the type of legislation proposed.

This note chronicles the divisive history of the Florida Official English amendment and analyzes why attempts to enforce this amendment by English-only legislation would violate federal statutory and constitutional law. Part two of this note sets forth the history of the amendment's passage, beginning with the 1980 Dade County English-only ordinance. Part three of this note discusses the constitutional and statutory issues that might be raised by English-only legislation enacted to enforce the amendment.

## II. HISTORY OF THE FLORIDA OFFICIAL ENGLISH AMENDMENT

### A. *Dade County English-Only Ordinance*

In 1959, the year of the Cuban revolution, Dade County's population of less than one million residents was 80% non-Hispanic white, 5.3%

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12. Karen Branch, *English-Only Scuffles Are Far From Over*, MIAMI HERALD, May 23, 1993, at 6B.

13. John Fernandez, *United Commission Votes to Dump Dade's English-only Measure*, PALM BEACH POST, May 19, 1993, at 1A.

14. Branch, *supra* note 12. Citizens for Dade United, a local organization that bitterly fought repeal of the English-only ordinance, announced a possible statewide petition drive to put teeth into the Official English amendment by making it impossible for government to conduct business in anything but English. *Id.*

15. Out of the 41,000 boat people picked up by the U.S. Coast Guard since a military coup ousted Haitian President Jean-Bertrand Aristide in September 1991, 11,000 have passed immigration officials' initial screening for political asylum. Lisa Ocker, *Let Haitians Go, Judge Orders*, SUN-SENTINEL, June 9, 1993, at 1A. On June 8, 1993, a federal judge ordered the release into the United States of 158 Haitians. *Id.* These Haitians had previously not been allowed to leave the U.S. Navy base at Guantanamo Bay, Cuba because they or their relatives had tested positive for HIV, the virus commonly thought to cause AIDS. *Id.* This has increased fears that many more thousands of refugees will be encouraged to flee Haiti for the United States. *Id.*

Hispanic, and 14.7% black.<sup>16</sup> As hundreds of thousands of Cubans fled their homeland, they poured into nearby Dade County, especially the city of Miami, which had long been popular with immigrants.<sup>17</sup> An influx of Haitians and Central Americans added to the ethnic influence.<sup>18</sup> By the time the Mariel boatlift of 1980 brought more than 100,000 new Cuban exiles into Miami, including a small but noticeable criminal element, it had become apparent that the Cubans were not temporary exiles who would soon return to a liberated Cuba.<sup>19</sup>

By November 1980, the population of Dade County was more than forty percent Hispanic.<sup>20</sup> Perhaps because they had seen their flight from Cuba as only temporary, perhaps due to close family ties, or perhaps simply because their numbers were so great, the Cubans had not followed the expected process of assimilation into pre-existing Miami life. Rather than accommodating the melting-pot theory, Cubans had become a culturally, economically, and politically distinct presence.<sup>21</sup>

As the Cuban influence grew, non-Hispanic whites felt increasingly alienated from their Hispanic neighbors and threatened with the loss of the community they had known.<sup>22</sup> Festivals, concerts, films, and theater, as well as the media, all began to reflect Miami's multi-ethnic nature.<sup>23</sup> Non-Hispanic whites began to complain of daily encounters with Cubans who were either unwilling or unable to speak to them in English.<sup>24</sup>

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16. Joanne Bretzer, *Language, Power, and Identity in Multiethnic Miami*, in LANGUAGE LOYALTIES 209-11 (James Crawford ed., 1992).

17. Max J. Castro, *On the Curious Question of Language in Miami*, in LANGUAGE LOYALTIES 178-79 (James Crawford ed., 1992).

18. Bretzer, *supra* note 16, at 213-14.

19. *Id.*

20. Castro, *supra* note 17, at 181.

21. Bretzer, *supra* note 16, at 213. This does not mean, however, that these immigrants have refused to learn English. Hispanics are learning English just as rapidly as preceding German, Italian, Jewish and other immigrant waves. Andres Viglucci, *Studies: Hispanics Are Learning English—And Fast*, MIAMI HERALD, July 31, 1988, at 15A. While it typically takes three generations for newcomers to become English-dominant, Hispanics approached a two-generation model during the 1980's. James Crawford, *Official English Amendment 11: Should English Become Florida's Official Language? No*, MIAMI HERALD, Oct. 16, 1988, at 1C (citing a study by demographer Calvin Veltman).

22. See Castro, *supra* note 17, at 179.

23. Bretzer, *supra* note 16, at 213.

24. See, e.g., *id.*, at 210. One Miami resident voiced the feelings of many non-Hispanic whites by declaring, "if I had wanted to live in a Latin country, I would have moved to one. . . . Strangers come up to me on the street to ask directions, in Spanish, presuming that everyone here knows the language. . . . Many of the criminals have Spanish surnames, but

Against this backdrop of simmering ethnic tension, and sparked by the final straw of the Mariel boatlift, the 1980 Dade County English-only ordinance was enacted.<sup>25</sup> The ordinance prohibited county officials from using any language but English, and from fostering any culture other than that of the United States.<sup>26</sup> "In effect, the county government had to conduct meetings and print documents only in English."<sup>27</sup> The ordinance was so restrictive that "even zoo signs identifying an animal's name in Latin violated the law."<sup>28</sup>

In 1984, the county commissioners voted to cure the most egregious overreachings of the ordinance by allowing certain exceptions for promoting tourism, providing medical and emergency services, and serving the elderly and handicapped.<sup>29</sup> Even these common-sense exceptions were met by bitterness and ethnic discord.<sup>30</sup> People attending the hearings held signs calling for the commissioners to be hanged.<sup>31</sup>

Even after the ordinance had been slightly relaxed, educational information was still restricted to English.<sup>32</sup> For example, Spanish directional signs in the county hospital had to be removed, and fire-prevention information, neo-natal care literature, and bus schedules could not be printed in Spanish.<sup>33</sup> In 1993, however, Federal court-ordered

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then so do the policemen. How many [other] major American newspapers have a Spanish-language edition, or need to?" *Pre-Cuban Miami Was a Good Place to Live*, MIAMI HERALD, Oct. 15, 1990, editorial, at 8A.

25. Citizens for Dade United, the political action group that organized the anti-bilingual campaign, was born practically overnight when two women met through a WNWS radio talk show. Castro, *supra* note 17, at 178. In just over four weeks, the group had gathered twice the necessary signatures to put the ordinance on the ballot. *Id.*

By the time the 1988 Florida Official English Amendment was passed, thirty-one Florida cities and two other counties had followed Dade County's lead by passing English-only or Official English laws or resolutions. Tom Lassiter, *English-only Fight Heats Up, Intent Unclear*, SUN-SENTINEL, Oct. 31, 1988, at 1A.

26. *Language Law Out in Dade; The County Commission Repeals the Ordinance That Made English the Only Medium for County Business*, ORLANDO SENTINEL, May 19, 1993, at A1.

27. Fernandez, *supra* note 13.

28. Califa, *supra* note 7.

29. Celia W. Dugger, *Metro OKs Bilingualism Law Changes*, MIAMI HERALD, Oct. 17, 1984, at 1D.

30. *Id.*

31. Craig Gemoules, *English Campaign Truce is Short-Lived*, MIAMI HERALD, Nov. 10, 1988, at 1C.

32. Maya Bell, *Where is English Battle Going?*, ORLANDO SENTINEL, Oct. 23, 1988, at G1.

33. *Id.*

redistricting resulted in a new commission that promptly voted to repeal the ordinance.<sup>34</sup>

### B. *The Florida Official English Amendment*

In early 1985, Florida English kicked off a campaign drive to collect enough initiative petition signatures to place the Official English amendment on Florida's ballot.<sup>35</sup> Florida English, a state organization, was sponsored by U.S. English, a national organization with the primary goal of a federal Official English amendment.<sup>36</sup> Placing the amendment on the 1988<sup>37</sup>

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34. *Dade Redistricting Could Lead to Repeal of 'English-only' Law*, PALM BEACH POST, May 3, 1993, at 8A; Fernandez, *supra* note 13.

35. Robert A. Liff, *In Fla., An Effort to Make English the Official Language*, PHIL. INQUIRER, Feb. 17, 1985, at CO3. "Amendments to the Florida Constitution must be approved by a majority of people voting on them in a general or special election." Bobette Husick, *Constitutional Amendments 1990*, ST. PETERSBURG TIMES, Oct. 30, 1990 (Citrus Times), at 2. Amendments can be placed on the ballot in one of five ways: (1) joint resolutions approved by a three-fifths vote of each house of the Legislature; (2) action of a constitution revision commission, which convenes every 20 years; (3) action of a constitutional convention, convened by citizen petition initiative; (4) action by the Taxation and Budget Reform Commission, which convenes every 10 years; and (5) *citizen petition initiatives*, requiring signatures equaling at least: (a) eight percent of the total votes cast in the last preceding general election, and (b) eight percent of the votes cast in the last preceding general election in at least half of the state's congressional districts. FLA. CONST. art. XI, §§ 1-6.

Of the 79 constitutional amendments placed on the Florida ballot between 1968 and 1990, six were citizen initiatives, three of which (the Sunshine Amendment, the Florida Lottery, and Official English) were approved. Husick, *supra*.

36. Liff, *supra* note 35. U.S. English, based in Washington, D.C., was founded in 1983 by Dr. John Tanton, an ophthalmologist and civic activist, and former U.S. Senator S.I. Hayakawa (R-Calif.), who had unsuccessfully introduced federal Official English legislation in 1981. Califa, *supra* note 7. By 1988, U.S. English had over 300,000 members and a seven million dollar annual budget. *Id.* U.S. English is located at 818 Connecticut Avenue, N.W., Suite 200, Washington D.C. 20006. 10 U.S. ENGLISH UPDATE 1 (Spring 1993) at 1.

In arguing that the real motivation behind U.S. English was discriminatory, critics pointed out that Tanton had previously founded the Federation for American Immigration Reform ("FAIR") in 1979 to lobby for stricter immigration policy. Califa, *supra* note 7. Critics also noted that Hayakawa, a native Canadian of Japanese ancestry, found it "'perfectly understandable' that Japanese-Americans were sent to relocation camps during World War II." *Former Sen. S.I. Hayakawa Dies, Defied Student Protesters in '60s*, ORLANDO SENTINEL, Feb. 28, 1992, at A1. Hayakawa died of a stroke at age 85 in 1992. *Id.*

37. Florida English had been previously unsuccessful in placing the Official English amendment on the 1986 Florida ballot. *See* Liff, *supra* note 35.

ballot would require 342,939<sup>38</sup> validated signatures<sup>39</sup> by August 9, 1988.<sup>40</sup>

From its inception, the proposed amendment generated suspicion and distrust, dividing its supporters and its opponents into hostile camps.<sup>41</sup> Both sides agreed that immigrants coming to this country need proficiency in English.<sup>42</sup> However, they disagreed on whether the amendment was necessary and whether it would ultimately help or harm non-English speaking people.<sup>43</sup> Amendment supporters and opponents also fiercely debated whether the true aims of the supporters were altruistic, nationalistic, or xenophobic.<sup>44</sup>

Opponents of the amendment feared that its passage would hurt South Florida's extensive business and tourism ties with Central and South America by insulting foreign investors and tourists.<sup>45</sup> They saw the amendment as a threat to elderly, less-fluent immigrants who might not be afforded a needed interpreter in the courtroom or in an emergency situation.<sup>46</sup> Opponents feared that the amendment would affect not only

38. Maya Bell, *Even Success Doesn't Stop English-only Petition Drive*, ORLANDO SENTINEL, Mar. 10, 1988, at D1.

39. Maya Bell, *English-only Petitions to be Peddled at Polls*, ORLANDO SENTINEL, Mar. 5, 1988, at D1. A validated signature is one that has been verified as belonging to a registered voter. *Id.*

40. Tom Lassiter, *English-only Amendment to Go to Vote, Last-Minute Blitz Nets Necessary Signatures*, SUN-SENTINEL, Aug. 9, 1988, at 1B.

41. See *infra* text accompanying notes 44-58. Ironically, 82% of those polled believed that sharing an official language would draw Floridians together, even as the amendment debate polarized the state. See Paul Anderson, *81% Support Official English, Amendment Backers' Poll Shows*, MIAMI HERALD, Sept. 24, 1988, at 20A.

42. *Leaders to Fight Ordinance, English-only Plan Crippling, Group Says*, SUN-SENTINEL, June 21, 1988, at 4B.

43. Supporters of the amendment charged the U.S. Government of pursuing a policy primarily directed at "native language maintenance" that could thwart the natural process of assimilation and language acquisition. Linda Chavez, *Official English Amendment 11: Should English Become Florida's Official Language? Yes*, MIAMI HERALD, Oct. 16, 1988, at 1C. However, this statement is at odds with recent demographic studies. See *supra* note 21.

44. See *infra* text accompanying notes 45-58. Xenophobia is a fear or hatred of foreigners. AMERICAN COLLEGE DICTIONARY 1411 (1970).

45. Tom Lassiter, *'Official Language' Vote OK'd 'English-only' Lobby Gains Court's Ruling*, SUN-SENTINEL, Feb. 5, 1988, at 13A.

46. *Florida's Constitutional Amendments on Official English*, MIAMI HERALD, Oct. 22, 1988, at 26A. In calling for the elimination of "911" services for non-English speakers, Florida English declared that "everybody calling the emergency line should have to learn enough English so they can say 'fire' or 'emergency' and give the address." Laura A. Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. REV. 17,

official governmental functions, but would contribute to the loss of freedom to speak a non-English language in the workplace.<sup>47</sup> They charged that the drive behind the amendment was fueled by bigotry and anti-Hispanic sentiments.<sup>48</sup> Opponents of the amendment included the Greater Miami Chamber of Commerce,<sup>49</sup> Florida's Roman Catholic bishops,<sup>50</sup> and Florida's governor.<sup>51</sup>

The difficulty in determining what the amendment would actually mean was due not only to the nonspecific nature of the amendment itself<sup>52</sup> but to the mixed motivations and contradictory statements of its supporters,<sup>53</sup>

51 (1990).

47. Zita Arocha, *Dispute Fuels Campaign Against Official English; Foes Say Memo Shows Racism's Behind Plan*, WASH. POST, Nov. 6, 1988, at A20. Opponents of the amendment also feared it would halt the purchase of foreign language books by public libraries. Tom Lassiter, *English-only Fight Heats Up, Intent Unclear*, SUN-SENTINEL, Oct. 31, 1988, at 1A.

48. Maya Bell, *Leader Quits Language Group Over Controversy*, SUN-SENTINEL, Oct. 18, 1988, at 3A.

49. *English-only Foes Push Spanish Plan*, SUN-SENTINEL, Apr. 9, 1988, at 19A.

50. *Official English is Racist, State Catholic Bishops Say*, SUN-SENTINEL, Oct. 7, 1988, at 14A. A representative of Florida's Roman Catholic bishops maintained that much of the support for the amendment was based on racism. *Id.*

51. *Allow the Vote*, MIAMI HERALD, Oct. 13, 1988, at 24A. Governor Bob Martinez noted, "We don't select a religion for Americans . . . and we have not selected a language for Americans. If you pass it, the only thing you'll get is hard feelings." *Id.*

52. Supporters of the amendment admitted that they did not know what legislation would be required to maintain English as the official language of government. Lassiter, *supra* note 47. "We are not legislators. The more specifics you put into this, the more it's going to be attacked." *Id.*

53. The stated goals of U.S. English, in addition to the passage of a national English amendment, were to reform bilingual education to use short-term immersion techniques rather than long-term transitional methods, and to eliminate bilingual ballots. Chavez, *supra* note 43. The executive director of U.S. English said her principal objection to bilingual balloting is that it makes voting "too easy." John Jacobs, *Supporters Spread Word on English-only Ballot*, WASH. POST, Nov. 12, 1983, at A8.

Florida English's campaign chairman, however, saw the amendment as having little real impact. Bell, *supra* note 39. He insisted that it was designed merely to turn the social reality of English as the state's official language into law, although he later stated that the practice of allowing applicants to take driver's license tests in Spanish should be reviewed. Lassiter, *supra* note 47. The campaign's spokeswoman, on the other hand, said that the campaign intended to ask legislators to encourage funding for English classes, promote foreign language instruction, and emphasize learning the geography and history of Central and South America. Bell, *supra* note 39.

Some supporters felt the amendment would mean that Florida's government would only be under no obligation to use non-English languages in the provision of services, while others saw it as a loud and clear mandate to government to conduct business in English only.



some of whom spoke Spanish fluently.<sup>54</sup> Supporters viewed the amendment as everything from a mere symbol<sup>55</sup> to a way of demanding government to curtail bilingual programs<sup>56</sup> or enact English-only legislation<sup>57</sup> to a way of forcing immigrants to speak English.<sup>58</sup>

Florida's Official English amendment won its first legal battle on February 4, 1988, after the state legislature directed the attorney general to petition the Florida Supreme Court for an advisory opinion as to the

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*Backers to Argue for English as Official Language*, MIAMI HERALD, Dec. 12, 1987, at 2C; Maya Bell, *Where is English Battle Going?*, ORLANDO SENTINEL, Oct. 23, 1988, at G1. News articles at times described the amendment as actually prohibiting state and local governments from using non-English languages in conducting public business. *Leaders to Fight Ordinance, English-only Plan Crippling, Group Says*, SUN-SENTINEL, June 21, 1988, at 4B.

Although supporters maintained that the intent of the proposed amendment was "not at all anti-Hispanic," they conceded that at least some of its backers were driven by discriminatory motives. Jon Marcus, *English Drive Called Racially Motivated, Backers Say Move 'Not Anti-Hispanic'*, SUN-SENTINEL, Jan. 9, 1988, at 14A. Some supporters hoped the impact of the amendment would be to force the use of English even in the private sector. Lassiter, *supra* note 40, at 1B. "English is the language that should be spoken in America," said the Broward County coordinator for Florida English. *Id.*

Some Floridians supported the measure because of their frustration at feeling like a foreigner in Dade County, and their annoyance at not being able to find a convenience store clerk or taxi driver who speaks English. Bell, *supra* note 32. Non-Spanish speaking employees felt uncomfortable and excluded when fellow employees, who could speak English, chose to speak Spanish in front of them. Lydia Villalva, *Hispanics Attack Ban on Spanish, English-only Amendment is Concern for Ethnic Group*, ORLANDO SENTINEL, Dec. 22, 1988 (Osceola Sentinel), at 1. An official language was seen by many as a way to prevent the country from becoming a "Tower of Babel." Bell, *supra* note 32. As of a 1987 survey, Spanish was the dominant language in 36.7% of all Dade County households. Marcus, *supra*.

54. For example, the spokeswoman for the Tampa-based Florida English Campaign spoke fluent English, as did the president of U.S. English. Zita Arocha, *Dispute Fuels Campaign Against Official English, Foes Say Memo Shows Racism's Behind Plan*, WASH. POST, Nov. 6, 1988, at A20; Lassiter, *supra* note 40; *Official English is Racist, State Catholic Bishops Say*, SUN-SENTINEL, Oct. 7, 1988, at 14A.

55. Bell, *supra* note 39. It seems unlikely, however, that U.S. English would contribute more than \$300,000 to Official English groups in Florida, Arizona, and Colorado (where Official English amendments were also on the 1988 ballot) to promote passage of a mere "symbol." See Susan Kelleher, *Advocates of Official English on the Defensive; Proponents of Ballot Measures in 3 States Deny Racism Charges in Wake of Controversy*, WASH. POST, Oct. 23, 1988, at A16.

56. Chavez, *supra* note 43.

57. Bell, *supra* note 32.

58. Lassiter, *supra* note 40.

petition's validity.<sup>59</sup> In holding that the initiative petition was legally sufficient, the court found that the amendment was not so broad as to violate the single-subject requirement of the Florida Constitution<sup>60</sup> and that the ballot summary fairly represented the substance of the amendment.<sup>61</sup>

The court rejected the attorney general's argument that because Florida law requires that "the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot," the ballot summary should explain in detail what the amendment's proponents hoped to accomplish by its passage.<sup>62</sup> The court held that the seventy-five word ballot summary required by statute did not have to provide this detail.<sup>63</sup> The court cautioned that its opinion dealt only with the legal validity of the amendment and ballot and, therefore, should not be construed as either favoring or opposing passage of the amendment.<sup>64</sup>

The court victory spurred amendment supporters into well-organized and heavily-funded<sup>65</sup> activity.<sup>66</sup> Petitions were distributed at festivals,

59. *In re Advisory Opinion to the Attorney General*, 520 So. 2d 11, 12 (Fla. 1988). An advisory opinion is required when an initiative petition has validated signatures equal to 10% of the state's voters in at least one-fourth of the congressional districts. FLA. STAT. ANN. § 15.21 (West Supp. 1993).

60. *In re Advisory Opinion to the Attorney General*, 520 So. 2d at 13. The purpose of the single-subject requirement of article XI, § 3 of the Florida Constitution is to avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support. *Id.* at 12. Opponents of the amendment argued that it was so broad that legislation to implement it might abridge the freedom of speech or the press, violate due process, or invade the right of privacy. *Id.* The court agreed that the amendment could have broad ramifications, but held that dealing with only one subject "on its face" was legally sufficient. *Id.* at 13.

61. *Id.* The attorney general had pointed out that the ballot summary stated that the amendment enables the legislature to "implement this article" by appropriate legislation, whereas the amendment itself gave the legislature the power "to enforce this section" by appropriate legislation. *In re Advisory Opinion to the Attorney General*, 520 So. 2d at 13. The court held that the differing use of terminology could not reasonably mislead the voters. *Id.*

62. *Id.*

63. *Id.* Based on the conflicting interpretations given the amendment by its supporters, however, see *supra* note 53, it strains credulity to think that a voter could really have "intelligently cast his ballot." See *supra* text accompanying note 62.

64. *In re Advisory Opinion to the Attorney General*, 520 So. 2d at 13.

65. U.S. English contributed more than \$300,000 to Official English groups in Florida, Arizona, and Colorado. Kelleher, *supra* note 55.

66. Amendment opponents did not organize until April, 1988, when prominent members of Miami's Hispanic community banded with members of the black, Anglo and Jewish communities to form English Plus, which was created with the blessings of the Greater Mi-

club and organizational meetings, and shopping centers.<sup>67</sup> The amendment's greatest gain, however, came when its supporters capitalized on the opportunity presented by the presidential primary ballot.<sup>68</sup>

On Super Tuesday, March 8, 1988, 500 volunteers and an equal number of paid staffers<sup>69</sup> staked out polling places across the state, asking voters<sup>70</sup> to sign Official English petitions.<sup>71</sup> Voters were more than willing to comply; the demand for petitions was so great that people stood in line to sign them, and complained when petitions were unavailable because the supply had been depleted.<sup>72</sup>

By the next day, the number of signatures collected had jumped from 240,000 to about 450,000, exceeding the 342,939 signatures required to put the amendment on the ballot.<sup>73</sup> Only 126,000 of the signatures had been validated, however, and campaign officials vowed to continue the petition

ami Chamber of Commerce. Andres Viglucci, *Opposition to Official English Debuts, Foes' Cry: Law Would Hurt Business*, MIAMI HERALD, June 20, 1988, at 1B; *English-only Foes Push Spanish Plan*, SUN-SENTINEL, Apr. 9, 1988, at 19A. English Plus is a concept declaring that it is best when individuals can acquire strong English language proficiency along with the mastery of two or more languages. *Official Language*, ORLANDO SENTINEL, Nov. 19, 1988, at D14.

English Plus aired radio spots and sponsored ads, conferences, and debates to deliver the message that the Official English amendment would be discriminatory and could cripple business and tourism in a state with such strong ties to Latin America. *Leaders to Fight Ordinance, English-only Plan Crippling*, SUN-SENTINEL, June 21, 1988, at 4B. In August, 1988, Speak Up Now for Florida ("SUN") was created to spread this message to North and Central Florida. Andres Viglucci, *Group to Speak Up For Florida, Will Battle Official English Drive*, MIAMI HERALD, Aug. 10, 1988, at 2B.

67. Tom Lassiter, *Signatures Increase for State's 'Official Language' Campaign*, SUN-SENTINEL, Apr. 26, 1988, at 2B.

68. Bell, *supra* note 38.

69. In *Meyer v. Grant*, 486 U.S. 414 (1988), the Supreme Court ruled that a Colorado statute prohibiting the use of paid circulators to gather signatures on an initiative petition violated the First and Fourteenth Amendments.

70. The signature of a registered voter had the advantage of being, by definition, a valid signature. See *supra* note 39. Aware that the sight of petition gatherers could arouse anger in some voters, particularly in Dade County, the petition gatherers were instructed to be "courteous and polite" and not to get into arguments. Bell, *supra* note 39.

71. Bell, *supra* note 38. Staffers, who were paid by the number of valid signatures collected, were organized by a professional consultant hired by U.S. English at a cost of over \$50,000. *Id.* While volunteers collected about 60,000 signatures, the equal number of paid staffers gathered over 150,000 signatures. The professional consultant noted, "[w]e do a lot of work with very dedicated volunteers, but nothing seems to motivate like profit." *Id.*

72. Lassiter, *supra* note 67. At this point, polls were showing about 74% support for the amendment. *Id.*

73. Bell, *supra* note 38.

drive until the required 342,939 signatures had been validated.<sup>74</sup> Eventually, 366,666 signatures were validated, exceeding the requirement to sign up at least eight percent of the number of residents who voted in the 1984 general elections.<sup>75</sup>

Just six days before the August 8th deadline for amendment initiatives, however, campaign officials realized that they had not met a second requirement to gather the eight percent in at least ten of the state's nineteen congressional districts.<sup>76</sup> They were, instead, one district short.<sup>77</sup>

Campaign officials targeted the twelfth congressional district, where another 956 signatures were required to pick up the district and meet the requirement.<sup>78</sup> The signatures were obtained, and, just twenty-four hours before the deadline, the state Division of Elections approved the referendum for the November ballot.<sup>79</sup> Many amendment opponents agreed with its supporters that, having been placed on the ballot, the amendment would probably be passed by the voters.<sup>80</sup>

In late October, 1988, however, amendment supporters suddenly found themselves on the defensive in the face of renewed charges of racism and bigotry when a memo written by John Tanton, the chairman and founding member of U.S. English, became public.<sup>81</sup> In the internal memo, Tanton suggested that the growing Hispanic population threatens the United States because Hispanics are both fertile and corrupt.<sup>82</sup> Tanton also suggested that Hispanics are overwhelmingly Catholic and therefore may not respect the well-established separation between church and state.<sup>83</sup>

In response to the memo, retired CBS anchorman Walter Cronkite resigned as a member of the U.S. English advisory board, and former

74. *Id.*

75. Tom Lassiter, *English-only Amendment to Go to Vote, Last-Minute Blitz Nets Necessary Signatures*, SUN-SENTINEL, Aug. 9, 1988, at 1B.

76. *Id.*

77. *Id.* A miscount by an election official in St. Lucie county had left the petition short by almost 1,000 signatures. *Id.*

78. *Id.*

79. Lassiter, *supra* note 75.

80. *Id.*

81. Maya Bell, *Leader Quits Language Group Over Controversy*, SUN-SENTINEL, Oct. 18, 1988, at 3A.

82. *Id.* In discussing birthrates, Tanton wrote: "Perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down." David Hacker, *Petosky Doctor Leads English Only Crusade*, DETROIT FREE PRESS, Feb. 14, 1989, at 3A. Tanton also wondered whether Latin-American immigrants will "bring with them the tradition of the mordida, or bribe." *Id.*

83. Bell, *supra* note 81.

Reagan aide Linda Chavez resigned as the organization's president.<sup>84</sup> Amendment opponents hoped that news of the memo would make Florida voters realize that they were being manipulated by a bigoted national organization with a dangerous hidden agenda.<sup>85</sup> Florida English's founder, Dr. Mark LaPorta, took immediate steps to distance his group from its sponsor, calling the memo anti-immigrant, anti-Hispanic, anti-Catholic, and "not what Florida English is all about."<sup>86</sup>

The Official English amendment met its second legal challenge when four registered voters, whose primary language was Spanish, sought to enjoin Florida officials from conducting an election on the citizen initiative.<sup>87</sup> The plaintiffs argued that the amendment petition violated the Voting Rights Act of 1965 because the petition, which was written only in English, was circulated in designated bilingual political subdivisions.<sup>88</sup> The plaintiffs' position was supported by the U.S. Department of Justice, which agreed that petitions should have been available in Spanish in six counties.<sup>89</sup>

The Court of Appeals for the Eleventh Circuit found, however, that the Voting Rights Act does not apply to initiative petitions because initiative petitions are related to political speech rather than to the process of casting a vote.<sup>90</sup> The court also found that involvement by state officials in the initiative process does not constitute state action because the state's responsibility is solely to ensure that the petition meets the requirements of

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84. *Id.* Linda Chavez said that her decision to step down was hastened by revelations that a major U.S. English backer had helped reprint "an awful, awful book" called *Coup of Saints*, which was a "paranoid fantasy" about "undesirables of the Third World" taking over developed nations. *Id.*

85. Kelleher, *supra* note 55.

86. Sandra Dibble, *Amendment Backers Downplay U.S. English Ties*, MIAMI HERALD, Oct. 20, 1988, at 3D.

87. *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), *cert. denied*, 492 U.S. 918 (1989). The voters were appealing a prior federal district court judgment dismissing their complaint. *Id.*

88. *Id.* Colorado voters had previously presented the same Voting Rights Act challenge to the Official English amendment petition in their state. *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989). The Tenth Circuit reversed a district court's order which had enjoined the Secretary of State of Colorado from conducting an election on the proposed amendment. *Id.*

89. Dave Von Drehle, *U.S. Fights Language Petitions, Official English Opponents Buoyed*, MIAMI HERALD, Nov. 3, 1988, at 1A.

90. *Delgado*, 861 F.2d at 1495.

law and will fairly present the proposed amendment.<sup>91</sup> The court's November 4, 1988, decision removed the amendment's last legal hurdle to being placed on the November 8th ballot.<sup>92</sup>

The Official English amendment moved quickly to victory on election day, passing with an overwhelming eighty-four percent of the vote.<sup>93</sup> As a conciliatory measure, amendment supporters joined with its opponents to warn that the amendment should not be used as an excuse for discrimination.<sup>94</sup> Nevertheless, the truce was short-lived.<sup>95</sup>

Florida English's Dr. LaPorta caused a near-riot when he urged repeal of the Dade County English-only ordinance, arguing that the ordinance should be pro-English like the amendment, rather than anti-bilingual.<sup>96</sup> Feeling betrayed, his former supporters rushed the stage, grabbing and breaking the microphone, and calling him a traitor.<sup>97</sup> This display convinced amendment opponents more than ever that amendment supporters were hard-core xenophobes with no constructive agenda.<sup>98</sup>

Several incidents immediately following the amendment's passage seemed to confirm the fears of its opponents as the amendment allegedly was misused to justify and vocalize anti-Hispanic sentiments.<sup>99</sup> A supermarket employee was suspended for speaking Spanish to another employ-

91. *Id.* at 1497. The state does not initiate, draft, or address the merits of petitions, and does not participate in the circulation of petitions or collection of signatures. *Id.* The court noted a distinction between Florida and states such as Massachusetts, where, pursuant to the Voting Rights Act, petitions are printed in both English and the applicable minority language because the state itself pays for and prints the initiative petitions. *Id.*

92. *Id.* at 1489. A later challenge to the Eleventh Circuit's ruling was rejected without comment by the United States Supreme Court. *See Delgado v. Smith*, 492 U.S. 918 (1989).

93. Maya Bell, *Workers, Customers Report Bias Over Non-English Use*, SUN-SENTINEL, Jan. 2, 1989 (Weekly Business), at 10. The actual tally was 3,457,039 for the amendment and 664,861 against. *Florida Trivia*, MIAMI HERALD, Apr. 3, 1991, at 1B.

94. Maya Bell, *State Gets An Official Language*, ORLANDO SENTINEL, Nov. 9, 1988, at D4.

95. *See id.*

96. Maya Bell, *English Won Vote, Now Comes Real Battle*, ORLANDO SENTINEL, Nov. 14, 1988, at B1.

97. *Id.*

98. *Id.*

99. Maya Bell, *English-only Rule Raises Concern*, ORLANDO SENTINEL, Dec. 11, 1988, at D1. On the other hand, charges of anti-Hispanic bias were sometimes raised to defend inconsiderate behavior, such as the use of Spanish to exclude others. Lydia V. Lijo, *Hispanics Attack Ban on Spanish, English-only Amendment is Concern for Ethnic Group*, ORLANDO SENTINEL, Dec. 22, 1988 (Osceola Sentinel), at 1.

ee;<sup>100</sup> a city mayor was quoted as making derogatory remarks about his Hispanic opponent;<sup>101</sup> and children complained that they were forbidden to speak Spanish in school hallways and on school buses.<sup>102</sup> An 18-year-old clause in a hospital handbook requiring employees to speak English during the workday was used for the first time to prohibit employees from speaking a foreign language to non-English-speaking patients and to each other.<sup>103</sup> A Spanish-speaking customer seeking to place an order was told that she must speak English.<sup>104</sup> Listeners who called into an English-language station talk show willingly admitted that they had voted for the amendment because it seemed to be anti-Hispanic.<sup>105</sup>

Despite these incidents, however, most legal experts felt that unless the legislature decided to "enforce this section by appropriate legislation," the amendment would remain nothing more than a symbolic measure.<sup>106</sup> In January, 1989, Florida's governor issued an executive order that recognized English as the state's official language and directed that all official records

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100. *Hispanics Blame English Law for Rise in Harassment*, ORLANDO SENTINEL, Nov. 16, 1988, at D3. Publix supermarket administrators, who apologized profusely and transferred the Coral Gables manager involved, nevertheless insisted that the cashier was actually disciplined for carrying on a personal conversation while serving a customer. *Id.* The written reprimand, however, cited only his use of Spanish. *Ethnic Ugliness*, MIAMI HERALD, Nov. 15, 1988, at 22A.

101. *Mayor Apologizes For Latin Remark*, ORLANDO SENTINEL, Nov. 17, 1988, at D8. The mayor, who later apologized, said that he was more qualified than his Hispanic opponent, because Hispanics like to sleep late. *Id.*

102. Lijo, *supra* note 99; *Hispanics Blame English Law for Rise in Harassment*, ORLANDO SENTINEL, Nov. 16, 1988, at D3.

103. Bell, *supra* note 99. The rule was subsequently rewritten. *Id.*

104. *Id.* Sears, Roebuck and Co. officials apologized for their employee's behavior. *Id.*

105. *Id.*

106. Bell, *supra* note 99. The California Attorney General, in discussing that state's Official English amendment, noted that the amendment was not merely symbolic, because a state act, in order to have a binding effect, must be published in English. Califa, *supra* note 7, at 302. However, the attorney general found that the text of the amendment does *not prohibit* the use of languages in addition to English. *Id.*

California's Official English amendment goes further than the Florida amendment. It not only gives the Legislature power to enforce the amendment by appropriate legislation, but commands the Legislature and state officials to "take all steps necessary to ensure that the role of English is preserved and enhanced." CAL. CONST. art. III, § 6. The amendment also prohibits the Legislature from making a law "which diminishes or ignores the role of English as the common language" of the state. *Id.*

and proceedings of state and local governments be in English.<sup>107</sup> The order also stated that the use of languages other than English in the state's economic, social, or political institutions, or by an employee in the workplace, *shall not be restricted*.<sup>108</sup> This order did not satisfy amendment supporters, however, and a U.S. English-backed bill which required that all official governmental acts, documents, and publications be in English was proposed in the Florida Senate in March, 1989.<sup>109</sup> Although a U.S. English director insisted that the bill was not English-only legislation,<sup>110</sup> the bill allowed for non-English communication only when necessary to comply with federal law.<sup>111</sup>

The bill's supporters predicted an easy victory, believing that legislators would respond to the overwhelming voter approval of the Official English amendment.<sup>112</sup> The bill, however, which was described as vague, unnecessary, and a threat to public health,<sup>113</sup> was defeated in a 3-3 vote after three Cuban-American senators gave impassioned arguments against it.<sup>114</sup>

In the four years since this bill was defeated, there have been no serious attempts to pass legislation which would enforce the Official English amendment. This period of relative quiet may be ending, however, now that

107. Tom Lassiter, *Print Government Documents in English, Group Proposes*, SUN-SENTINEL, Mar. 14, 1989, at 20A.

108. *Id.* The governor's press secretary noted that the governor was more interested in ensuring that the amendment did not interfere with the health, safety, and welfare of all Floridians than in regulating foreign languages. Maya Bell, *English Won Vote, Now Comes Real Battle*, ORLANDO SENTINEL, Nov. 14, 1988, at B1.

109. Lassiter, *supra* note 107. The proposed legislation stated "[a]ll official documents that are governmental acts must be in English except that translation services and accommodating communications are permissible to comply with Federal laws and regulations. All official publications must be printed and made available in English." *Id.*

110. *Id.* If, as the U.S. English director insisted, the bill was not English-only legislation, there would seem little point in promoting it, since it would then be quite similar to the governor's executive order.

111. *Id.* The same U.S. English director conceded that official documents were already being maintained in English, but argued that a law was necessary to sustain the status quo. *Id.*

112. John Kennedy, *Panel Kills English-only Plan, Amendment Backers Vow to 'Regroup, Retrench and Reorganize'*, SUN-SENTINEL, May 18, 1989, at 24A.

113. Wesley Loy, *Senate Panel's Tie Vote Kills English-only Bill*, ORLANDO SENTINEL, May 18, 1989, at B3. In calling the bill unnecessary, Senator Ileana Ros-Lehtinen (R-Miami), argued that there was not a single government document printed in a foreign language and not English. *Id.* The senator also said that the bill was so vague in defining an "official document" that it could threaten public health by stopping state publications such as AIDS pamphlets printed in Spanish and Creole. *Id.*

114. Kennedy, *supra* note 112.



the Dade County English-only ordinance has been repealed.<sup>115</sup> The constitutional and statutory issues raised by English-only legislation that could be enacted to enforce the amendment is the subject of Part three of this note.

### III. LEGAL RAMIFICATIONS OF POSSIBLE LEGISLATION TO ENFORCE THE OFFICIAL ENGLISH AMENDMENT

#### A. *Constitutionality of the Amendment Itself*

In order to analyze the legality of any legislation created to enforce the Florida Official English amendment, it is first necessary to determine whether the amendment itself might be unconstitutional. The Florida Supreme Court found the amendment's initiative petition legally valid.<sup>116</sup> However, some authors have suggested that all Official English amendments, even those such as Florida's which have not been "enforced by appropriate legislation," are unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment.<sup>117</sup>

Laws potentially implicate the Equal Protection Clause when they treat one class of people differently than another class.<sup>118</sup> Such laws are analyzed with varying levels of scrutiny: strict, intermediate, and rational basis.<sup>119</sup> Strict scrutiny, which is the highest level of scrutiny, is only applied when the law infringes on a fundamental right, such as the right to vote, or when the law operates to the disadvantage of a suspect class, such as a class based on race or national origin.<sup>120</sup> When strict scrutiny is applied, the law must be necessary for a compelling governmental interest or the law will be struck.<sup>121</sup>

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115. See *supra* note 14. Fears about the influx of Haitian refugees may also lead to renewed attempts to enforce the Official English amendment. See *supra* text accompanying note 15.

116. See *supra* text accompanying notes 59-61.

117. See, e.g., *supra* note 7, at 330; Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992). The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

118. See *infra* text accompanying notes 120-25.

119. See *infra* text accompanying notes 120-25.

120. See, e.g., *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

121. See, e.g., *Burson v. Freeman*, 112 S.Ct. 1846, 1852 (1992).

Intermediate scrutiny is applied when the class has not been found to be "suspect," but still merits heightened judicial review, such as a class based on gender.<sup>122</sup> When intermediate scrutiny is applied, the law must be substantially related to an important governmental interest, or the law will be struck.<sup>123</sup>

All other classes are analyzed under rational basis.<sup>124</sup> A law is rarely defeated under this level of scrutiny; rational basis merely requires that a law be rationally related to a legitimate governmental interest in order to be upheld.<sup>125</sup>

The Supreme Court has not resolved the question of whether language-based discrimination constitutes a "suspect class."<sup>126</sup> However, several authors have made a convincing argument that language is a proxy for national origin, and therefore language-based discrimination should be afforded the same strict scrutiny as discrimination based on national origin.<sup>127</sup>

The Official English amendment would not necessarily be struck, however, even assuming that language-based discrimination deserves strict scrutiny analysis and assuming that language unity is not a compelling state interest. The amendment would not be violative of the Fourteenth Amendment unless it can first be shown that the amendment is intentionally discriminatory.<sup>128</sup> Purposeful discrimination is commonly referred to as *de jure* discrimination.<sup>129</sup>

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122. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

123. See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

124. See, e.g., *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 167-175 (1980).

125. See *id.*

126. See Cordero, *supra* note 7, at 26.

127. See, e.g., Califa, *supra* note 7, at 347-48; Cordero, *supra* note 7, at 26; Perea, *supra* note 117, at 370-71.

One author argues that people who are reluctant to acknowledge racist tendencies are more comfortable using language as a basis for exclusion because language, unlike race, is seen as a mutable quality; language choice is something one can be held accountable for. Joanne Bretzer, *Language, Power, and Identity in Multiethnic Miami*, in *LANGUAGE LOYALTIES* 209, 215 (James Crawford ed., 1992).

128. See *Washington v. Davis*, 426 U.S. 229, 247 (1976). A law is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. *Id.* at 242.

129. *De jure* means "by law." BLACK'S LAW DICTIONARY 425 (6th ed. 1990). Discrimination that is found not to result from a discriminatory purpose is known as "*de facto*" discrimination. See *id.* at 416.

De jure discrimination can be found either: (1) on the *face* of the law;<sup>130</sup> (2) through discriminatory *application* of the law;<sup>131</sup> or (3) by evidence of the discriminatory *intent* of the law.<sup>132</sup>

Florida's Official English amendment is not discriminatory either facially, or by application, because it does not legislate the *exclusion* of another language.<sup>133</sup> Some authors contend, however, that the xenophobic nature of all Official English amendments is sufficient evidence of discriminatory intent to satisfy the de jure requirement.<sup>134</sup>

The history of Florida's Official English amendment, discussed in Part two of this note, however, clearly reveals that its supporters interpreted the amendment in various ways, and backed it for various reasons. This inconsistency in motivating factors, combined with the Supreme Court's reluctance to infer discrimination based on intent,<sup>135</sup> renders it unlikely that the requisite de jure discrimination would be found, despite the clearly discriminatory purpose of many of the amendment's backers.<sup>136</sup>

Assuming, then, that the Florida Official English amendment itself would not be found unconstitutional, the question is whether legislation enacted to enforce it by putting "teeth" into the amendment, as many of its supporters advocate,<sup>137</sup> would be legally valid.<sup>138</sup> Such legislation would

130. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 303-04 (1880).

131. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886).

132. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

133. See *supra* text accompanying notes 9 and 106.

134. See, e.g., *Califa*, *supra* note 7, at 324-25; *Perea*, *supra* note 117, at 356-57.

135. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 (1977); *City of Richmond v. United States*, 422 U.S. 358, 378 (1975).

136. See *supra* text accompanying note 105.

137. See *supra* text accompanying note 14.

138. It should be noted that Dade County's English-only ordinance, which was extremely restrictive, was repealed before being facially challenged on constitutional grounds. See *supra* text accompanying notes 25-34. The ordinance did lose in another legal challenge, however.

After substantial research and consultation between Dade County's Election Department, Communications Department, and the office of the County Attorney, Dade County reached the conclusion that the ordinance prohibited the county from publishing and disseminating election pamphlets in Spanish. *United States v. Metropolitan Dade County*, 815 F. Supp. 1475, 1476 (S.D. Fla. 1993). The United States challenged the county's English-only publication of election pamphlets, and the federal district court agreed, holding that a voter information pamphlet was "assistance or . . . information relating to the electoral process" that should have been provided in the language of the applicable minority group. *Id.* at 1477-78. Ironically, the election related to these election pamphlets was based on court-ordered redistricting and subsequently resulted in a new commission that repealed the ordinance. See *supra* note 34, at 1A.

transform the amendment into English-only legislation that might implicate the First and Fourteenth Amendments and violate the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

### B. *First Amendment Considerations*

Legislation to enforce the amendment could require all official governmental acts to be in English. This requirement could take two forms: (1) requiring any official governmental act to be in English, in addition to any other language used; or (2) restricting official governmental acts to English-only. The first alternative would make little sense, since it would go no further than the governor's 1989 executive order, which did nothing to change the status quo because official documents were already being maintained in English.<sup>139</sup> It seems more likely that legislation supporters would attempt to have the amendment replicate the repealed English-only Dade ordinance by restricting official state and local governmental acts to English-only.<sup>140</sup>

Attempts to restrict governmental acts to English, however, to the *exclusion* of other languages, would likely violate the First Amendment, which prohibits laws "abridging . . . the freedom of speech."<sup>141</sup> Regulation of content-based speech must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end" to be constitutionally valid.<sup>142</sup> With respect to English-only legislation, a compelling state interest can be found in the need for the state's government to communicate with its constituents. Requiring public agencies such as state courts, county hospitals, and city police departments to operate exclusively in English, however, would be counter-productive, rather than "necessary," where those constituents cannot speak English. English-only legislation also fails the "narrowly-drawn" requirement because there are less restrictive means of improving communication, such as increasing the quality and availability of English-instructional courses.

English-only legislation, which could be far-reaching when taken to its logical extremes, is also likely to be unconstitutionally vague. Under such

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139. See *supra* text accompanying note 107.

140. See *supra* text accompanying notes 25-34.

141. U.S. CONST. amend. I.

142. *Widmar v. Vincent*, 102 S.Ct. 269, 274 (1981). The guarantee of free speech, however, "does not comprehend the right to speak on any subject at any time." *American Communications Ass'n v. Douds*, 339 U.S. 382, 394 (1950). Certain speech, such as obscenity, defamation, and "fighting words," is considered undeserving of constitutional protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

legislation, governmental officials might feel compelled to communicate only in English during a disaster such as 1992's Hurricane Andrew. A bilingual county hospital employee might believe she could not legally utilize her ability to comfort a dying patient in his own language. A police officer might feel restricted to English while pursuing and apprehending a Spanish-speaking suspect. If individuals affected by the English-only legislation are uncertain as to its application, they will "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked."<sup>143</sup> A law which reasonably deters people from engaging in otherwise protected speech is unconstitutionally vague.<sup>144</sup>

This reasoning is in accord with the holding in *Yniguez*, an Arizona case.<sup>145</sup> Arizona's Official English amendment, which was adopted by initiative petition at the same time as Florida's amendment, specifically provides that the state and its subdivisions act in English and in *no other language*.<sup>146</sup> A federal court found the amendment facially invalid as overbroad because it gave rise to substantial potential for inhibiting constitutionally protected free speech.<sup>147</sup>

143. *Yniguez v. Mofford*, 730 F. Supp. 309, 317 (D. Ariz. 1990), *aff'd and rev'd in part*, 939 F.2d 727 (9th Cir. 1991) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

144. *Id.* at 315 (citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n.6 (1982)).

145. *See id.* at 309.

146. *See* ARIZ. CONST. art. XXVIII, § 3. The amendment binds all government officials and employees during the performance of all government business, and gives standing to any person who resides in or does business in the state to bring suit to enforce the amendment. *Id.* §§ 1, 4.

147. *Yniguez*, 730 F. Supp. at 314. Ms. Yniguez was a government employee who often spoke Spanish to Spanish-speaking persons asserting medical malpractice claims against the state. *Id.* at 310. After passage of the Official English amendment, Yniguez, who had signed a state loyalty oath promising to obey the Arizona Constitution, immediately ceased speaking Spanish while performing her official duties because she feared sanctions for speaking Spanish. *Id.*

In finding that the Official English amendment violated the First Amendment, the court did not accept the Arizona Attorney General's restrictive construction of the state amendment. *Id.* at 315. The Attorney General interpreted the amendment to mean that the English-only requirement applies solely to official acts of the state governmental entities and does not prohibit the use of languages other than English that are reasonably necessary to facilitate the day-to-day operation of government. *Id.* at 315. The court criticized the Attorney General's opinion as a "remarkable job of plastic surgery upon the face of the [amendment]." *Yniguez*, 730 F. Supp. at 316.

The federal court noted that no Arizona state court had as yet construed or interpreted the state's amendment. *Id.* at 315. A class action suit is currently pending, whereby it is alleged that plaintiffs' rights under the First, Ninth, and Fourteenth Amendments have been

### C. *Equal Protection Under the Fourteenth Amendment*

Florida English spokespersons have repeatedly claimed that driver's license tests should not be offered in Spanish because such tests give immigrants the mistaken notion that it is not necessary to learn English.<sup>148</sup> Eliminating Spanish driver's license tests, they claim, would be a step toward language unity.<sup>149</sup> The question of eliminating such tests would likely become a heated topic in any renewed push to enforce Florida's Official English amendment, especially since driver's license tests may soon be offered in Creole as well.<sup>150</sup>

Any statute to prohibit non-English driver's license tests, however, potentially implicates the Equal Protection Clause.<sup>151</sup> Assuming, as discussed above, that language discrimination deserves strict scrutiny analysis, the required *de jure* discrimination would be found on the face of

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violated by the Arizona Official English amendment. *Ruiz v. Arizona*, No. CV 92-19603 (Ariz. Mar. 4, 1993).

Ironically, on July 2, 1993, Arizona became the first state in the nation to conduct a naturalization ceremony partly in Spanish. *Hispanics Take Oath as Citizens Ceremony Conducted Mostly in Spanish*, SUN-SENTINEL, July 3, 1993, at 4A. The ceremony was held for immigrants who had been allowed, based on their age and residency, to take the citizenship test in their native language. *Spanish in Citizenship Ceremony Upsets English-only Supporters*, MIAMI HERALD, July 3, 1993, at 12A.

U.S. English, which has backed several unsuccessful proposals for a national Official English amendment over the last decade, reacted to the unfavorable Arizona court ruling by backing yet another proposed national amendment, the "Language of Government Act," introduced by Representative Bill Emerson (R-MO) on January 5, 1993. See 10 U.S. ENGLISH UPDATE 1 (Spring 1993), at 1. The Language of Government Act, like the Arizona amendment, requires government to conduct its official business in English and grants allegedly injured persons the standing to file suit. See H.R. 123, 103d Cong., 1st Sess. (1993). The Act attempts to circumvent the Arizona amendment's First Amendment problems by stating that the Act is "not intended to discourage or prevent the use of languages other than English in any nonofficial capacity." See *id.*

148. Lassiter, *supra* note 47.

149. *Id.*

150. Telephone Interview with representative of the Bureau of Records, Division of Driver's Licenses, Florida Department of Highway Safety and Motor Vehicles (June 11, 1993). Driver's license examinations are currently available statewide in both English and Spanish. *Id.* An application has been filed for the federal funding of examinations in Creole as well, in order to accommodate the growing Haitian community. *Id.*

151. A statute to prohibit non-English driver's license tests may also be violative of the Civil Rights Act of 1964, which bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance." *Lau v. Nichols*, 414 U.S. 563, 566 (1974). Driver's license tests are funded by federal grant. See *supra* note 150.

the statute. The statute would *exclude* non-English languages on its face by prohibiting non-English speaking persons from taking the driver's license test.

Given strict scrutiny, a statute prohibiting non-English driver's license tests would fail. Even if promoting language unity is a compelling state interest, prohibiting non-English driver's license tests to promote it would be neither necessary nor productive. While studies have shown that Florida immigrants are in fact learning English rapidly,<sup>152</sup> and past events indicate that English-only laws lead to ethnic bitterness,<sup>153</sup> nothing has supported the theory that English-only driver's license tests lead to language unity.

Even if the argument that language is a proxy for national origin discrimination were rejected and the English-only statute was analyzed under rational basis scrutiny, it is likely that the statute would be struck. Even assuming that promoting language unity is a legitimate state interest, a law leading to ethnic divisiveness cannot be rationally related to promoting language unity.

#### D. *Violating the Civil Rights Act of 1964*

Official English supporters and critics agree that it is a socioeconomic imperative for United States immigrants to learn English.<sup>154</sup> Official English supporters, however, want to shift away from bilingual education<sup>155</sup> to the "sink-or-swim" approach of English-immersion classes.<sup>156</sup>

The question, then, is whether legislation to enforce the Official English amendment by prohibiting bilingual education in the public schools would survive a legal challenge. The answer depends on whether the bilingual program would simply be withdrawn, leaving a child "immersed"

152. See *supra* note 21.

153. See *supra* text accompanying notes 25-31.

154. *Leaders to Fight Ordinance, English-only Plan Crippling, Group Says*, SUN-SENTINEL, June 21, 1988, at 4B.

155. In bilingual education, a non-English-speaking child keeps up with other classes in her native language while studying English until she is proficient enough to attend all classes in English. Puig-Lugo, *supra* note 3.

156. Andres Viglucci, *Supporters of English Target Polls Push Official Language*, MIAMI HERALD, Mar. 6, 1988, at 1A. Today, U.S. English has shied away from using the term "English-immersion." Its current flyer insists that Official English legislation does not even affect bilingual education. *What is Official English?*, U.S. ENGLISH FACTS (undated). Another flyer states, however, that the newly proposed "Language of Government Act," see *supra* note 147, will strengthen "the purpose of bilingual education, that of teaching non-English proficient . . . children English." *Common Questions about Official English*, U.S. ENGLISH ISSUES (undated).

in English-only classes, or whether the child's native language would continue to be used, on a limited basis, in order to teach the child English.

In *Lau v. Nichols*,<sup>157</sup> the Supreme Court held that by denying Chinese children the opportunity to learn English, the school district had violated the Civil Rights Act of 1964, which bans discrimination based "on the ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance."<sup>158</sup> The Court found that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>159</sup> Therefore, any attempts to restrict bilingual education in Florida would have to ensure that English language instruction would still be available and meaningful.<sup>160</sup>

#### E. *Violating the Voting Rights Act of 1965*

The call to "eliminate bilingual ballots" was a rallying cry behind Florida's Official English campaign.<sup>161</sup> However, it appears that Official English supporters are now willing to concede that eliminating bilingual ballots would not be possible, at least at the state level.<sup>162</sup>

The federal Voting Rights Act of 1965 requires that state and local governments publish bilingual election ballots in designated bilingual

157. 414 U.S. at 563.

158. *Id.* at 566. By relying solely on § 601 of the Civil Rights Act of 1964 to reverse the court of appeals, the Court did not reach the Equal Protection argument advanced by the plaintiffs. *Id.*

159. *Id.* A concurring opinion emphasized the substantial number of non-English speaking students involved and would not consider the decision as conclusive in situations where only a very few students were involved. *Id.* at 572 (Blackmun, J., concurring).

160. A 1990 agreement worked out between Florida's Department of Education and anti-discrimination groups that had threatened to sue the state was seen as a step around the Official English amendment. Luisa Yanez, *State's Schools to Relax Rules for English-only Amendment*, SUN-SENTINEL, Aug. 16, 1990, at 1A. Under the agreement, new statewide guidelines would: (1) end the disciplining of non-English-speaking students for using their native language at school; (2) classify minority students by nationality, rather than solely by race; (3) require that information sent from schools to students' homes be written in the parents' native language; (4) guarantee that students who lack proficiency in English are not shut out of programs for the gifted, talented, or handicapped; and (5) mandate close monitoring of dropout rates among students not fluent in English. *Id.* The cost of the program was estimated to be in the millions of dollars for Broward, Dade, and Palm Beach counties. *Id.*

161. *See supra* note 53.

162. *Common Questions about Official English*, U.S. ENGLISH ISSUES (undated).



political subdivisions.<sup>163</sup> Several counties in Florida have been designated as bilingual political subdivisions.<sup>164</sup> Since the Supremacy Clause of Article VI provides that state law must yield to federal law in case of conflict,<sup>165</sup> a state statute prohibiting bilingual ballots, thereby conflicting with federal law, would not be valid.

#### IV. CONCLUSION

Florida's Official English amendment, despite the alleged high ideals of many of its supporters, served only to widen the rift between the English-speaking and Hispanic communities of Florida. Fortunately, the amendment has not been enforced and remains a mere symbolic measure. Despite the ill-will it engendered, the amendment is not unconstitutional, even under strict scrutiny analysis, because it lacks the requirement of *de jure* discrimination. Discriminatory intent is not likely to be inferred based on the mixed motivations of its supporters.

English-only legislation, however, would serve to *exclude* other languages and people who do not speak English. Therefore, although the unenforced Official English amendment is not unconstitutional, English-only legislation to enforce the amendment would likely violate federal statutory and constitutional law.

Finally, even if the Official English amendment could be legally

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163. 42 U.S.C. § 1973aa-1a (1981 & Supp. 1993). The Voting Rights Act of 1965, as amended in 1975, extended in 1982 as the Voting Rights Act Amendments of 1982 and in 1992 as the Voting Rights Language Assistance Act of 1992, requires state and political subdivisions to publish bilingual voting materials when:

(i)(I) more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient;

(II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or

(III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and

(ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

*Id.*

164. See *supra* text accompanying notes 88-89.

165. U.S. CONST. art. VI, cl. 2.

enforced through English-only legislation, it seems unlikely that such legislation could result in the public good. Enforcing the amendment would not only renew intercultural hostilities and cause unnecessary hardships, but it would legitimize the idea of language exclusion. In a state such as Florida, where the Spanish-speaking voting population has increased so dramatically, the legitimized idea of legalized language exclusion could someday be turned against the advocates of the Official English amendment themselves.

*Donna M. Greenspan*

## PART II

### THE LEGISLATURE

*Although most people consider the Florida Legislature as being responsible only for passing laws as needed, the Constitution actually places many other responsibilities on the Legislature as well. Accordingly, the second part of our Symposium focuses on the constitutional duties of the Legislature.*

*Dr. P.C. Doherty begins with an analysis of the recently-enacted "Eight is Enough" amendment. His insightful article reveals that the Legislature will face serious problems when it attempts to put the amendment's provisions into operation. Next, Patricia A. Gleason and Joslyn Wilson, both of whom serve in the Office of the Florida Attorney General, describe the also recently-added "Open Government" amendment and the impact that it will have on the Legislature. Assistant Florida Attorney General George L. Waas then looks at reapportionment, a subject that causes the Legislature grief at least once each decade.*

*Professor Robert M. Jarvis continues the examination by considering the most symbolic of all of the Legislature's duties: the duty to prescribe the state flag and seal. Finally, Nova Law Review staff member Eugene Neimy Bardakjy discusses an issue that has been hotly debated by Floridians for years and may ultimately have to be resolved by the Legislature: whether Florida should legalize gambling.*

# A Quodlibet, A Mumpsimus, and the Rule of Infield Flies: The Unfinished Business of Term Limits In Florida

**P.C. Doherty\***

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## I. INTRODUCTION

“Sorry to interrupt the festivities,’ said Hal, ‘but we have a problem.’”  
These words, which appear on page 120 of the novelization of the film  
2001: A Space Odyssey<sup>1</sup> and serve as the first notification of the lesson to

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\* Dr. Doherty earned his B.S. from North Georgia College, and his MSPA and Ph.D. from Florida State University where he authored a six-volume, 3401 page dissertation on the subject of Florida legislative events ca. 1954-1990. Currently, he hopes to one day actually make a living preserving, studying, writing, and teaching about the legal and social history of Florida's Legislature and Government.

The author wishes to thank Florida State University President Talbot "Sandy" D'Alemberte for his early and continuing encouragement; the late Professor Augustus B. Turnbull, III, of Florida State University, for believing serious academic study of Florida state-level government & politics is both useful and needed; Doris W. Bates of Fort Walton Beach, Florida, for reading and commenting on early drafts; Dr. Allen Morris, Clerk Emeritus and Historian of the Florida House of Representatives, for his learned counsel over the years on the understudied and fascinating world of the Florida Capitol; Mr. Eric D. Rosenberg of Nova University Law Review for a superb job editing; and Mr. Robert Jarvis, Professor of Florida Constitutional Law at Nova University Shepard Broad Law Center, for his gracious review of the completed draft.

1. ARTHUR C. CLARKE, 2001: A SPACE ODYSSEY 120 (Signet Books 1968); 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968). "Hal," was the familiar term used to address the spaceship "Discovery's" on board HAL-9000 computer, which had as its primary

come: no matter how careful and thorough we may think we have been in the application of our technical skills, our best-laid plans, in the somewhat more classic words of Robert Burns, still can "gang aft agley."<sup>2</sup>

In the present instance, what the agley has ganged after is Florida's recently passed term-limitation amendment; but the problems are not to be found in how, or even if, its provisions apply to the members of Florida's congressional delegation. True, there is a significant question in the enactment as it regards these offices, but as was the case in the movie, the concern over this apparent and obvious issue seems to have obscured others much closer to home. The first of these is a minor knot which could affect the timing of the applicability of the amendment to certain offices. Somewhat more Gordian is the second as it, if left unaddressed, shall, among other odd things, free the Gerrymander to fly in the fourth dimension.

## II. TERM LIMITS COME TO FLORIDA

The term limit provision of the Florida Constitution was drafted by a team composed of what was described as, "the best political and legal minds

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responsibility the day-to-day running of the ship during its voyage into deep space. The machine was essentially a sentient being and was considered to be so well and perfectly designed as to be incapable of error. Unfortunately, it (he) knew this, and when his preoccupation with concealing from his human crew mates a bit of secret information programmed into him by the experts on earth—while at the same time obliquely referring to it—led him to make a small mistake, that was caught by the humans, he could not admit fault. Instead, he slipped into a kind of paranoia and elected to believe that since he knew himself to be incapable of error, the revelation of any alleged error would cause the mission to suffer. So he tried to prevent this by killing the humans who, he reasoned, had not been given the secret he possessed and so must be out to destroy both him and the mission. Thus, was exposed the most grievous design flaw imaginable. *Id.*

2. ROBERT BURNS, *To a Mouse on Turning Up Her Nest with a Plow*, November 1785, in THE LITERATURE OF ENGLAND 118-19 (George K. Anderson & William E. Buckler eds., 5th ed., vol. 2, Scott, Foresman & Co., 1966) (1786). This mot is among the most famous of all those found in Burns' poetry, and the image it conveys is so universal its use has become ubiquitous if not actually hackneyed. The entire stanza which contains the line reads:

But Mousie, thy art no thy lane,  
In proving foresight may be vain:  
The best-laid schemes o'mice an' men  
Gang aft agley,  
An' lea'e us naught but grief an' pain,  
For promised joy!

*Id.*

in the State,”<sup>3</sup> headed by David Cardwell of the law firm of Holland and Knight during a six to eight week period during the months of February, March and April of 1991.<sup>4</sup> The team had been brought together in February 1991 by Orlando-based financier-politico Phil Handy. Mr. Handy, who had first achieved statewide notice for his role in the 1986 election of Governor Bob Martinez, decided to undertake the campaign for term limits, in part, due to the virtual nationwide groundswell of support such endeavors had enjoyed since they began in 1989 or 1990.<sup>5</sup> Wherever it was possible to do so, or so it seemed, initiatives to limit the terms of state and federal officeholders were cropping up and meeting with enthusiastic approval. And though the “political class,” as the pundits of the scribbling class tagged them, spoke and worked against such proposals, their point of view lost so regularly and so decisively that by the end of 1992 fifteen states had adopted limits of one kind or another.<sup>6</sup>

During this period, a term limit initiative suffered a notable defeat at the polls in only one jurisdiction. In the State of Washington a particularly harsh measure was put forward which would have both limited terms and applied the time constraints retroactively. The effect would have been to unseat a number of incumbents including the United States Speaker of the House, Tom Foley. In response to this threat, Representative Foley and his colleagues actively joined the debate and managed, albeit very narrowly, to beat back the drive. Subsequently, however, they were not so successful.

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3. Telephone Interview with John Sowinski, Former Campaign Manager, *Citizens For Ltd. Political Terms* (a.k.a. “Eight Is Enough”) (June 21, 1993).

4. *Id.*

5. As with every popular and successful political movement, a number of claimants have come forward to the designation of “originator” of the modern term-limits crusade. As there is no practical way of sorting out these claims, simply dating the probable start of them will have to suffice.

6. Telephone Interview with Cleta Deatherage Mitchell, Executive Director, *Term Limits Legal Institute* (July 21, 1993). The 15 states which currently have some form of term limit provision are: Arkansas, Arizona, California, Colorado, Florida, Missouri, Michigan, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wyoming. In addition, a term limit proposal has recently been approved as of July 1993 to appear on the ballot in Maine during 1994. The specific details of the various term limit provisions differ from state to state and a complete listing would exceed the scope of this article. Suffice to say that as written, and notwithstanding any legal challenges pending against them, the limitations break down into three main categories: (1) those which limit both federal and state officials; (2) those which limit state officials only; and (3) those which limit state officials immediately and which *may* limit federal officials in specific events or situations come to pass. Most typically this trigger is tied to “x” percent (or number) of other states adopting term limits for their federal officeholders.

A new measure was submitted to Washington voters which did not include retroactivity, and it was adopted.<sup>7</sup>

Retroactivity aside, the single biggest question to arise with regard to term limits is whether it is constitutional for states to unilaterally restrict the length of service of the members of their congressional delegations.<sup>8</sup> Usually those who claim term limits are impermissible declare that the states have no power to enact qualifications for the holding of federal offices which are in excess of those laid out in the United States Constitution because such are applicable to the states under the Supremacy Clause.<sup>9</sup> Others challenge the states' ability to do so based upon objections they have on how the restrictions would inhibit First Amendment-protected free (political) speech which is applicable to the states via the Fourteenth Amendment.<sup>10</sup> Still others declare such limits cannot stand scrutiny because they deny voters of the affected states rights guaranteed under the Equal Protection Clauses of the Fourteenth and Fifth Amendments.<sup>11</sup> To limit the terms of congressional officials in one state without limiting the terms in all states would, they claim, deprive the term-limited states' citizenry of meaningful representation particularly given Congress' seniority-based leadership system.<sup>12</sup>

The Handy-Cardwell team addressed each of the well known areas of

7. *Id.*

8. *Id.* Though the question of whether states may limit the terms of their own state officials has been raised, most notably in California, their prerogative to do so has been consistently upheld.

9. *Id.* Article I, Section 2, of the United States Constitution provides: "No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. Article I, Section 3, of the United States Constitution states: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3. Article VI (the Supremacy Clause) of the United States Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

10. See Mitchell *supra* note 6.

11. *Id.*

12. *Id.* According to Ms. Mitchell, this argument is among the principal ones currently being raised by the Speaker of the United States House of Representatives, Thomas Foley, and his Washington State colleagues in their challenge to that jurisdiction's recently enacted term-limit measure. *Id.*

the possible troubles discussed above.<sup>13</sup> With regard to retroactivity, Floridians decided to make their initiative prospective only. It would not apply either to time already served in previous terms by an occupant of a covered office nor would it apply to anyone in the midst of a term which had begun prior to the initiative becoming part of Florida's basic law.<sup>14</sup> Adopting this posture was smart both politically and judicially. The Florida Supreme Court had already disallowed "retroactive application of a constitutional amendment[s] to pre-adoption conduct."<sup>15</sup>

The other problem, that of finding a way to apply the restrictions to Florida's congressional officials, presented a more difficult task which the framers elected to counter by skirting the heart of it entirely. Beginning with the provisions of Article I, Section 4 of the United States Constitution, which gives states the power to "prescribe" the "Times, Places, and Manner of holding Elections for Senators, and Representatives,"<sup>16</sup> and then adding to this the reserved powers language of the Tenth Amendment,<sup>17</sup> the drafters decided not to make the issue of term limitations one of the qualifications a person must have to hold a particular office. Rather, they decided to make it one of ineligibility to stand for re-election by adding a new time-sensitive disqualification to the existing disqualifications found in article VI, section 4, of the Florida Constitution which prohibits certain individuals from voting or appearing on the ballot for election to office.<sup>18</sup>

13. See Sowinski *supra* note 3.

14. See *supra* note 4.

15. See *Baillie v. Town of Medley*, 262 So. 2d 693, 697 (Fla. 3d Dist. Ct. App. 1972), *appeal dismissed*, 279 So. 2d 881 (Fla. 1973); *Myers v. Hawkins*, 362 So. 2d 926, 933 (Fla. 1978).

16. See the United States Constitution which provides:

Section 4. The Times, Places and Manner of holding Elections for Senators, and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1.

17. U.S. CONST. amend. X. Though elegant as a statement of intent, the Tenth Amendment has not had much practical effect. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

18. See *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metro. Transit Auth.* 469 U.S. 528 (1985). At the time "Eight Is Enough" was being developed, article VI, section 4, of the Florida Constitution provided: "Section 4. Disqualifications.—No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." FLA. CONST. art. VI, § 4.



In other words, under this scheme, while it would be legal for a person to hold a covered office in excess of the maximum consecutive time prescribed, once that person had reached the limit he or she would have to contrive to remain there by some means other than being re-elected, something which under most realistic circumstances one can imagine, would be an almost impossible stunt to pull off. The only real weakness in this approach would be if Congress, acting under the authority granted it in Article I, Section 4, attempted to fashion legislation overruling the provision.<sup>19</sup>

In addition to the advantage of not directly addressing the issue of the "qualifications for holding federal office,"<sup>20</sup> there was a second benefit to adopting the "disqualification for ballot purposes"<sup>21</sup> approach. Simply put, using the vehicle of article VI, section 4 of the Florida Constitution eliminated the necessity of drafting language which would attach itself to more than one place in the Florida document.<sup>22</sup> Of the six types of offices the framers wished to cover, election of Florida State Senators and State Representatives were dealt with in article III, section 15;<sup>23</sup> the Lt. Governor and members of the Cabinet were housed in article IV, section 5;<sup>24</sup> and the

19. See *supra* note 16.

20. See *supra* note 9.

21. See *supra* note 18 and accompanying text.

22. For example, of those plans authored in the Legislature in 1992, most proposed amending and/or creating three sections in three separate articles. The next most popular numbers were two sections in two articles. Only one legislative vehicle proposed a single change to a single article and this measure would have applied term restrictions to state legislators only. See FLA. LEGIS. FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION, HISTORY OF SENATE BILLS, at 30-31, SJR 54. At the other extreme, Senate Joint Resolution 1204, *Id.* at 114, SJR 1204, proposed five separate changes to five separate articles.

23. Article III, section 15, of the Florida Constitution reads in pertinent part:

SECTION 15. Terms and qualifications of legislators.—

(a) SENATORS. Senators shall be elected for terms of four years, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four . . .

(b) REPRESENTATIVES. Members of the house of representatives shall be elected for terms of two years in each even-numbered year.

(c) QUALIFICATIONS. Each legislator shall be at least twenty-one years of age, an elector and resident of the district from which elected and shall have resided in the state for a period of two years prior to election.

FLA. CONST. art. III, §15.

24. Article IV, section 5, of the Florida Constitution reads in pertinent part:

SECTION 5. Election of governor, lieutenant governor and cabinet

United States Senators and United States Representatives were not mentioned anywhere. Therefore, if the direct route were taken, a potential amendment would have to add new language to two existing sections while creating a third entirely new one.<sup>25</sup> Though the framers knew such an amendment would probably stand court review for sufficiency under the “single subject requirement” found in article XI, section 3,<sup>26</sup> owing to its “logical and natural oneness of purpose,”<sup>27</sup> it could conceivably have proved more vulnerable to attack than would one adding a single block of new text to a single section. Also, from a purely political standpoint, an attempt to amend multiple sections simultaneously could have ended up confusing the electorate, and hence more vulnerable in the fall than a single, unified item.<sup>28</sup>

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members; qualifications; terms.—

(a) At a state-wide general election in each calendar year the number of which is even but not a multiple of four, the electors shall choose a governor and a lieutenant governor and members of the cabinet each for a term of four years . . . [I]n the general election and party primaries, if held, all candidates for the offices of governor and lieutenant governor shall form joint candidacies in a manner prescribed by law so that each voter shall cast a single vote for a candidate for governor and a candidate for lieutenant governor running together.

(b) When elected, the governor, lieutenant governor and each cabinet member must be an elector not less than thirty years of age who has resided in the state for the preceding seven years. The attorney general must have been a member of the bar of Florida for the preceding five years . . . .

FLA. CONST. art. IV, § 5.

25. The single place, single block of text coverage of all offices was not a feature of any of the proposals submitted to the Legislature. In addition, none of the legislative proposals addressed themselves in any way to article VI, section 4. Instead, the legislative proposals all addressed themselves to some combination of the following: article III, section 15 (terms and qualifications of legislators); article III, section 19 (new section providing legislative term limits); article IV, section 5 (election of governor, lieutenant governor and cabinet members; qualifications; terms); article X, section 16 (new section in “miscellaneous” article prescribing term limits for congressional officials); and article XII, section 20 (new section in “schedule” article providing for establishment of terms limits and for the timing of their imposition).

26. FLA. CONST. art. XI, § 3, reads in pertinent part:

SECTION 3. Initiative.—The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith . . . .

*Id.*

27. See *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984); Advisory Opinion to the Attorney Gen.—Limited Political Terms In Certain Elective Offices, 592 So. 2d 225, 226-27 (Fla. 1991) [hereinafter *Advisory Opinion to the Attorney General*].

28. See *supra* note 4.

The above matters of approach and placement aside, the final decisions facing the framers had to do with the allowable time limits and the specific wording. Here the team adopted what they felt was the "sensible" course.<sup>29</sup> Rather than deviate from the length of time allowed in the sole limit on service provision then present in the Florida Constitution, which capped the tenure of a Governor at maximum of eight consecutive years, they chose to adopt the same figure as the maximum stay in all specified offices.<sup>30</sup> All covered officials<sup>31</sup> could appear on the ballot for reelection only so long as by the end of their current term they had not completed eight consecutive years of service.<sup>32</sup> To enact this restriction, the drafters then chose to copy, almost exactly, the language already present in article IV, section 5(b), which applies to the Governor.<sup>33</sup>

With the intellectual and technical underpinnings thus in place, the initiative's backers produced their petition and on April 15, 1991, Federal

29. See *supra* note 4.

30. All Florida Constitutions have contained a provision limiting the length of time a governor may serve. Prior to 1968, this limit was always set at a single four-year term though governors could run and serve again later. The 1968 language limits a governor to two consecutive four-year terms if he is elected in his own right, or to one full four-year term should he succeed to the office and serve therein for more than two years in a term to which someone else had been elected. FLA. CONST. art. IV, § 5.

31. U.S. Senators, given the initiative's wording, would be allowed to serve two full six-year terms for a total of twelve consecutive years.

32. See Sowinski *supra* note 3. In making this decision, the framers of "Eight Is Enough" chose to ignore an obvious loophole which from time to time will allow persons who succeed to office during a term to serve more than eight consecutive years. For example, Secretary of State Jim Smith, was appointed in 1987 to fill the office vacated by Secretary of State George Firestone, who had last been reelected in 1986. Mr. Smith, under "Eight Is Enough", would have been eligible to serve a total of eleven years and a few months. This was possible because he could have run for one two-year term (the remaining portion of the Firestone term), and then for two consecutive four-year terms on his own before he would have served eight consecutive years in that office by the end of the "current" term.

By the reverse of the same token, any United States Senator appointed to an unfinished term where two or more of the six years remained would be limited to election in his/her own right, to a single full 6-year term of his/her own before the "eight consecutive years" in office provision would prohibit him/her from further appearances on the ballot for reelection to that office.

33. The specific language setting forth this limit in article IV, section 5(b), of the Florida Constitution reads:

No person who has, or but for resignation would have, served as governor or acting governor for more than six years in two consecutive terms shall be elected governor for the succeeding term.

FLA. CONST. art. IV, § 5(b).

Income Tax Day, to launch their campaign for public support. Thereafter, the concept of term limits proved just as popular in Florida as it had elsewhere.<sup>34</sup>

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34. In full, and with its "Ballot Summary," the text of the "Eight Is Enough" Initiative Petition read:

**TITLE: LIMITED POLITICAL TERMS IN CERTAIN ELECTIVE OFFICES**

**Summary:** Limits terms by prohibiting incumbents who have held the same elective office for the preceding eight years from appearing on the ballot for re-election to that office. Offices covered are: Florida representative and senator, lieutenant governor, Florida cabinet, and U.S. senator and representative. Terms of office beginning before amendment approval are not counted.

**Full Text Of Proposed Amendment:** Be It Enacted by the People of Florida that:

The people of Florida believe that politicians who remain in elective office too long may become preoccupied with re-election and beholden to special interests and bureaucrats, and that present limitations on the President and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office.

Therefore, to the extent permitted by the Constitution of the United States, the people of Florida, exercising their reserved powers, hereby declare that:

1) Article VI, s. 4 of the Constitution of the State of Florida is hereby amended by:

- a) Inserting "(a)" before the first word thereof and,
  - b) Adding a new sub-section "(b)" at the end thereof to read:
- (b) No person may appear on the ballot for re-election to any of the following offices:

- (1) Florida representative,
- (2) Florida senator,
- (3) Florida lieutenant governor,
- (4) any office of the Florida cabinet,
- (5) U.S. representative from Florida, or
- (6) U.S. senator from Florida

If, by the end of the current term of office, the person will have served (or, but for resignation would have served) in that office for eight consecutive years.

2) This amendment shall take effect on the date it is approved by the electorate, but no service in a term of office which commenced prior to the effective date of this amendment will be counted against the limit in the prior sentence.

3) If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application. The people of Florida declare their intention that persons elected to offices of public trust will continue voluntarily to observe the wishes of the people as stated in this initiative in the event any provision of this initiative is held invalid.

Citizens for Ltd. Political Terms, Initiative Petition (1992) (original petition on file with State

By late 1991, the "Eight Is Enough" drive was going so well that the State Attorney General petitioned the Florida Supreme Court for a ruling on the initiative's sufficiency for inclusion on the ballot should it obtain the requisite number of signatures. On December 19, 1991, the justices gave their approval by a vote of five to two.<sup>35</sup> With Justices Overton and Kogan dissenting in part. Their objections related to the inclusion of the federal offices, and Justice Kogan also found fault with the wording and effect of the initiative's severability clause.<sup>36</sup> Both Justices agreed with the majority that "Eight Is Enough" was fit as it regarded the state-level offices.<sup>37</sup>

With the ruling of the high court, the path was open for the amendment to be placed on the ballot, but before it did the entire issue of term limits had to transit the 1992 regular session of the Florida Legislature. By that time Florida's political class was wide awake and paying great attention. No fewer than thirteen joint resolutions were introduced during the sixty day meeting which suggested term-limiting constitutional changes of one sort or another.<sup>38</sup> Some of these affected all of the offices the initiative sought to cover.<sup>39</sup> Some did not. Some proposed limiting the terms of state legislators only,<sup>40</sup> one the Cabinet only,<sup>41</sup> and some included Congress, while

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Division of Elections).

35. *Advisory Opinion to the Attorney Gen.*, 592 So. 2d at 225 (Fla. 1991).

36. *Id.*

37. *Id.* at 232.

38. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION, HISTORY OF HOUSE BILLS [hereinafter HISTORY OF HOUSE BILLS]. The joint resolutions introduced in the Florida House of Representatives during the Twelfth Legislature, Second Session were: House Joint Resolution 121, *Id.* at 205, HJR 121; House Joint Resolution 379, *Id.* at 222, HJR 379; House Joint Resolution 459, *Id.* at 228, HJR 459; House Joint Resolution 485, *Id.* at 231, HJR 485; House Joint Resolution 549, HISTORY OF HOUSE BILLS, at 234-35, HJR 549; House Joint Resolution 745, *Id.* at 247, HJR 745; House Joint Resolution 1097, *Id.* at 270, HJR 1097. The joint resolutions introduced in the Florida Senate were: Senate Joint Resolution 54, FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION HISTORY OF SENATE BILLS, 30-31, SJR 54 [hereinafter HISTORY OF SENATE BILLS]; Senate Joint Resolution 98, *Id.* at 34, SJR 98; Senate Joint Resolution 238, *Id.* at 44, SJR 238; Senate Joint Resolution 844, *Id.* at 88, SJR 844; Senate Joint Resolution 1184, *Id.* at 113, SJR 1184; and Senate Joint Resolution 1204, *Id.* at 114, SJR 1204.

39. Joint resolutions of this type were: House Joint Resolution 459, House Joint Resolution 745, and Senate Joint Resolution 844. See HISTORY OF HOUSE BILLS, *supra* note 38; HISTORY OF SENATE BILLS, *supra* note 38.

40. Joint resolutions of this type were: House Joint Resolution 485, House joint Resolution 549, House Joint Resolution and Senate Joint Resolution 54. See HISTORY OF HOUSE BILLS, *supra* note 38; HISTORY OF SENATE BILLS, *supra* note 38.

others did not.<sup>42</sup> The time limits they contained varied as well from a high of sixteen consecutive years<sup>43</sup> to a low of eight.<sup>44</sup> The most popular cut off was twelve years and this was the limit found in the scheme which went the furthest in the process.<sup>45</sup> This joint resolution, submitted by a score of prime sponsors and nearly half again as many co-sponsors, originated in the house. On its top two lines were to be found the names of House Rules and Calendar Committee Chairman Bo Johnson, a Democrat who was scheduled to become Speaker in November of 1992; and Representative James Lombard, a Republican who served as House Minority Leader.<sup>46</sup>

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41. See HISTORY OF SENATE BILLS, *supra* note 38. House Joint Resolution 121 was this type. See *id.* at 205, HJR 121.

42. Joint resolutions which included members of Congress were: House Joint Resolution 379, House Joint Resolution 459, and Senate Joint Resolution 1184. See HISTORY OF HOUSE BILLS, *supra* note 38; HISTORY OF SENATE BILLS, *supra* note 38. Joint resolutions which did not include members of Congress were: House Joint Resolution 121, House Joint Resolution 485, House Joint Resolution 549, House Joint Resolution 1097, Senate joint Resolution 54, Senate Joint Resolution 98, Senate Joint Resolution 238, Senate Joint Resolution 844, and Senate Joint Resolution 1204. See HISTORY OF HOUSE BILLS, *supra* note 38; HISTORY OF SENATE BILLS, *supra* note 38.

43. See HISTORY OF HOUSE BILLS, *supra* note 38 at 270, HJR. 1097 (proposed FLA. CONST. art. III, § 19; art. XII, § 20).

44. Joint resolutions in this category were: House Joint Resolution 121, House Joint Resolution 485, and Senate Joint Resolution 1204. See HISTORY OF HOUSE BILLS, *supra* note 38; HISTORY OF SENATE BILLS, *supra* note 38.

45. *Id.* The twelve year limit, for at least some of the offices covered, was a feature of all the following joint resolutions: House Joint Resolution 379, (12 years for state legislators and members of congress only); House Joint Resolution 459 (12 years for state legislators and members of congress, and maximum of 8 years for lieutenant governor and cabinet); House Joint Resolution 549 (state legislators only); House Joint Resolution 745, (state legislators, cabinet, lieutenant governor); Senate Joint Resolution 98, (state legislators and cabinet members); Senate Joint Resolution 844, (state legislators, cabinet, lieutenant governor); and Senate Joint Resolution 1184, (12 years for state legislators and members of congress, and maximum of 8 years for lieutenant governor and cabinet). See *supra* note 38.

46. *Id.*; OFFICE OF THE CLERK, THE FLORIDA HOUSE OF REPRESENTATIVES, CLERK'S MANUAL 1990-1992 (1991). The prime sponsors and co-sponsors of H.R.J. Res. 745, their highest official position(s) during the 1992 regular session, and their tenure in office as of the end of their 1990-1992 term of office were (in order of signatures):

Prime Sponsors: Rep. Bo Johnson (D-Milton), Chairman, House Committee on Rules and Calendar, Speaker-Designate for 1992-1994 biennium, serving 7th term (14 years consecutive); Rep. James Lombard (R-Osprey), Republican Leader of the House of Representatives, serving 4th term (8 years consecutive); Rep. Everett A. Kelly (D-Tavares), Speaker Pro Tempore of the House of Representatives, serving 7th term (14 years consecutive); Rep. Harry C. Goode (D-Melbourne), Chairman, House Committee on Ethics and Elections, serving 3rd term (6 years consecutive); Rep. Kelley R. Smith, Jr. (D-Palatka), Vice Chairman, House Committee on Ethics and Elections, serving 1st full term following

In practice, any measure possessing this kind of pedigree will swamp any competing proposals; the Johnson-Lombard resolution<sup>47</sup> ("House

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initial partial term of 7 months (2 years, 7 months consecutive); Rep. Fred Lippman (D-Hollywood), serving 7th term (14 years consecutive). Note: Mr. Lippman had been, until forced to step down in 1991 due to adverse publicity, House Majority Leader. He remained, however, an influential member of the house in 1992 due to his close connection to Rep. Bo Johnson.; Rep. Joe Viscusi (D-Lakeland), Vice Chairman, House Committee on Tourism, Hospitality, and Economic Development, serving 1st term (2 years consecutive); Rep. Luis E. Rojas (R-Hialeah), serving 2nd term (4 years consecutive); Rep. Debby P. Sanderson (R-Ft. Lauderdale), serving 5th term (10 years consecutive); Rep. Willie Logan, Jr. (D-Opa Locka), Chairman, House Committee on Corrections, serving 5th term (10 years consecutive); Rep. Susan Guber (D-Miami), Chairman, House Committee on Vocational/Technical Education, serving 3rd term (6 years consecutive); Rep. Patricia "Trish" Muscarella (R-Clearwater), serving 1st term (2 years consecutive); Rep. Brian P. Rush (D-Tampa), Chairman, House Committee on Claims, Vice Chairman, House Committee on Natural Resources, serving 3rd term (6 years consecutive); Rep. Hurley W. Rudd (D-Tallahassee), Chairman, House Committee on Natural Resources, serving 3rd term (6 years consecutive); Rep. David Flagg (D-Gainesville), Vice Chairman, House Committee on Health Care, serving 2nd term (4 years consecutive); Rep. Thomas J. "Tom" Tobiasson (D-Gonzalez), Vice Chairman, House Committee on Finance and Taxation, serving 5th term (10 years consecutive) in current seat which immediately followed 2 terms (8 years consecutive) as a member of the senate which immediately followed 3 terms (6 years consecutive) as a member of the house (total legislative service as of 1992 was 24 years consecutive); Rep. William Thomas "Tom" Mims (D-Lakeland), Vice Chairman, House Committee on Postsecondary Education, serving 2nd term (4 years consecutive); Rep. Walter "Walt" Young (D-Pembroke Pines), Chairman, House Committee on House Administration, serving 10th term (20 years consecutive); Rep. Norman "Norm" Ostrau (D-Plantation), Chairman, House Committee on Regulated Industries, serving 3rd term (6 years consecutive); and Rep. Buzz Ritchie (D-Pensacola), Vice Chairman, House Committee on Appropriations, serving 2nd term (4 years consecutive).

Co-Sponsors: Rep. Kenneth "Ken" Pruitt (R-Port St. Lucie), serving 1st term (2 years consecutive); Rep. James E. King, Jr. (R-Jacksonville), serving 3rd term (6 years consecutive); Rep. Art Grindle (R-Altamonte Springs), serving 5th term (10 years consecutive); Rep. Betty S. Holzendorf (D-Jacksonville), Vice Chairman, House Committee on Community Affairs, serving 2nd full term following initial 6-month partial term (4 years, 6 months consecutive); Rep. Tom Banjanin (R-Pensacola), Assistant House Republican Floor Leader, serving 3rd term (6 years consecutive); Rep. Robert T. Harden (R-Fort Walton Beach), serving 3rd term (6 years consecutive); Rep. Miguel A. "Mike" De Grandy (R-Miami), serving 1st full term following initial 14-month partial term (3 years, 2 months consecutive); Rep. Michael Edward "Mike" Langton (D-Jacksonville), Vice Chairman, House Committee on Health and Rehabilitative Services, serving 3rd full term following initial 13-month partial term (7 years, 1 month consecutive); and Rep. Jack Ascherl (D-New Smyrna Beach), Chairman, House Committee on Insurance, and Vice Chairman, House Committee on Commerce, serving 3rd term (6 years consecutive).

47. H.R.J. Res. 745, 12th Leg., 2d Sess. (1992).

Resolution 745") proved no exception.<sup>48</sup> The resolution cleared subcommittee on day one of the session,<sup>49</sup> cleared full committee on day three,<sup>50</sup> was placed on the General Calendar on day eight,<sup>51</sup> and on day ten it was placed on the Special Order Calendar, taken up, passed, and sent immediately to the senate.<sup>52</sup>

Subsequently, the resolution lost momentum. Fourteen days passed before the senate, on day twenty-four, got around to formally receiving it and assigning it to a committee.<sup>53</sup> Once in committee, it languished until it died quietly, as did its sister proposals, when the regular session adjourned sine die on March 13, 1992.<sup>54</sup>

This spare history of the Legislature's effort to either climb on board the term-limit train, or mitigate its impact, does not tell the most politically interesting side of the story. To deal with this, we must return to when House Resolution 745 was still on the house fast track and touch on something that informally came to be known as the "supremacy clause."<sup>55</sup>

In concept, the supremacy clause contained in the original rendering of House Resolution 745 was, for those who take delight in the fine points of the process, a gem. It provided that if both House Resolution 745 and Phil Handy's Eight Is Enough (and/or any other term-limit proposals) appeared on the same ballot, and both (or all) passed, then the term-limit resolution authored by the Legislature would take precedence and would be the one to go into the constitution.<sup>56</sup> Needless to say, this proviso drove the Eight Is

48. *See id.*

49. FLA. H.R. JOUR. 00119 (Reg. Sess. 1992).

50. *Id.*

51. *Id.*

52. FLA. H.R. JOUR. 00148-00150 (Reg. Sess. 1992).

53. FLA. S. JOUR. 00196 (Reg. Sess. 1992).

54. While not mandated in the Florida Constitution, both houses of the Legislature operate under a scheme whereby all bills and resolutions introduced during a given session die at the end of that session if not passed. Accordingly, all 1992 regular session bills and resolutions in and of both houses died where they stood on March 13, 1992 when the Legislature adjourned sine die.

55. *See Sowinski supra* note 3. Mr. Sowinski, who played an active role in lobbying against the approval of any legislative attempts to place a term limit amendment on the ballot which would necessarily compete with "Eight Is Enough," stakes a claim to having first used the term "supremacy clause" as it applies here. As the author can find no better claimant it seems fair to give Mr. Sowinski the credit.

56. The so-called "supremacy clause" which appeared in House Resolution 745 took the form of an amendment to Article XII of the Florida Constitution. It proposed creation of a new sub-section (§ 20(b)), and read as follows:

If at the general election at which the amendments proposed by this



Enough crowd wild.<sup>57</sup> In appearances before the House Ethics and Elections Committee, as well as in one-on-one meetings with house members, the Eight Is Enough supporters tried to get the supremacy clause removed or modified. For example, one of these alternatives provided that in case of passage of more than one term-limit proposal, the one which received the most votes would prevail.<sup>58</sup>

Initially things went badly. All attempts to quash or modify were spurned under the watchful eye of Representative Johnson. All knew that when Mr. Johnson became Speaker in a few months he would be in a position to pass out political plums to "cooperative" members while withholding them from those who had not been viewed as "reasonable."<sup>59</sup> Yet despite this, Eight Is Enough would not give up. They continued working against the Supremacy Clause, and the joint resolution itself, as it wound its way toward floor action.<sup>60</sup>

On January twenty-third (day ten) the winding stopped. Mr. Johnson, as Rules and Calendar Committee Chairman, pulled the bill up onto the floor and the debate was joined.<sup>61</sup> Lobbying continued right up until the last minute, and even though the media had been quite critical of the supremacy clause, there was no indication the Chairman was prepared to yield.<sup>62</sup> In fact, just the opposite was assumed: he would, using the considerable clout at his disposal as he rose toward the speakership, ram the proposal through.<sup>63</sup> Yet instead of doing this, Mr. Johnson suddenly reversed field. He offered an amendment of his own to delete the "supremacy clause." It passed,<sup>64</sup> and for a moment the Eight Is Enough crowd was stunned. Then a possible reason for Representative Johnson's

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resolution are adopted, there is also adopted an amendment which provides different limitations on the terms of office of members of the legislature, the lieutenant governor, on members of the cabinet, this amendment shall prevail, and such other amendment shall be inoperative and of no effect.

*Id.*

57. See *supra* note 4.

58. *Id.*

59. *Id.* Whether or not Mr. Johnson would have actually sought to punish any less-than-cooperative members of the committee is, of course, open to debate. However, this type of assumption is common enough in the Florida Capitol for any bill regarded as the "pet" of any Speaker (or Senate President) Designate. Further, it is a perception which Speakers (or Presidents) Designate generally do nothing to disabuse.

60. *Id.*

61. FLA. H.R. JOUR. 00148 (Reg. Sess. 1992).

62. See Sowinski *supra* note 3.

63. *Id.*

64. FLA. H.R. JOUR. 00148 (Reg. Sess. 1992).

about face became clear as a number of his colleagues withdrew amendments they had prepared eliminating or modifying the offending provision.<sup>65</sup> Such was the battle. Once it ended, House Resolution 745 was debated, passed, and sent to the Senate where, as reported earlier, it was taken into custody and never seen alive again.<sup>66</sup>

Such was not the case with Eight Is Enough. Throughout the early months of 1992, the petition drive continued apace and until in mid-June the petition's fathers submitted it to the Secretary of State for inclusion on the November 3, 1992 General Election ballot.<sup>67</sup> The Secretary's office took approximately one month to conduct its review and on Thursday July 23, 1992 announced the initiative had qualified.<sup>68</sup> It would appear on the ballot as "Amendment # 9"<sup>69</sup>—to the dismay of some who had hoped, for alliterative reasons, that it would receive the number "8."

So now it was on to the fall, and Mr. Handy's troops held the upper hand from the outset. Though an organized opposition, mostly composed of ex-lawmakers and lobbyists (many were both), did attempt to make itself heard, it never really attracted much in the way of public notice or credibility, not to mention support.<sup>70</sup>

At length election day arrived and the results were, in a word, clear. 5,436,340, or 83.1%, of Florida's 6,541,925 registered voters went to the

65. See Sowinski *supra* note 3.

66. *Id.* According to Mr. Sowinski, Florida House Joint Resolution 745 was essentially "dead on arrival" in the senate, which had informally decided to avoid dealing with the issue of term limits entirely. Though the measure was eventually assigned to the Senate Committee on Executive Business, Ethics and Elections, as well as to the Senate Committee on Rules and Calendar, FLA. S. JOUR. 00196 (Reg. Sess. 1992), should it clear the former, the Chairman of the Committee of first reference, Senator Arnett Girardeau (D-Jacksonville), never placed it on the agenda.

67. See Sowinski *supra* note 3.

68. Telephone Interview with Division of Elections, Office of the Secretary of State (June 21, 1993) [hereinafter Division of Elections].

69. See Sowinski *supra* note 3.

70. *Id.* One of these groups, "Let The People Decide—Americans For Ballot Freedom," had surfaced as far back as the previous year and had filed a brief with the Florida Supreme Court when the Attorney General submitted the "Eight Is Enough" petition for review. Of those individuals willing to sign on as respondents in the case, most were former members of the Legislature including five former Speakers of the House (two of whom were also former members of the Cabinet). Two signatories were former members of the Florida Supreme Court (a third former justice acted as lead counsel for the group). One signatory was a former President of the State Senate, and one was an incumbent member of the United States House of Representatives who had also served as a member of the Florida house before his election to Congress. See *Advisory Opinion to Attorney Gen.*, 592 So. 2d at 225 (Fla. 1991).

polls. Of these approximately 4,722,627, or 86.8%, registered an opinion on the question of adopting Amendment #9. Only 713,713 electors, or 13.1%, chose to ignore the question. Of those who did cast ballots 76.8% (3,625,500) did so in favor, while 1,097,627, or 23.2%, said "No." The raw difference in terms of votes cast for and against was 2,528,373. It was, especially given how far down the ballot Amendment #9 appeared, a blowout by anyone's measure.<sup>71</sup> In addition, emphasis was added to the results when all the votes were tabulated from all the states which had similar measures on their general election ballots. When these numbers became available it was apparent that the percentage of Florida voters voting in the affirmative was virtually unsurpassed anywhere.<sup>72</sup> Phil Handy had caught the wave at just the right time and ridden it standing up.

So now it is 1994. Florida has a term-limit provision in its constitution ready to do its work.<sup>73</sup> Of course the question of the federal officials remains unsettled. How long that issue will take to wind its way through the judicial machinery is anyone's guess, but as said earlier, the issues relating to its resolution will not be addressed here. For our purposes, in fact, where mention of federal officeholders is necessary at all, the limits will be assumed to be fully applicable. Our focus from here forward will be on two aspects of Eight is Enough as it applies to the Florida Legislature which, at 160 seats, is the largest single institution covered by the amendment.

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71. FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, NOVEMBER 3, 1992 GENERAL ELECTION RESULTS (November 16, 1992).

72. See Sowinski *supra* note 3.

73. Article VI Section 4 of the Florida Constitution, as amended by "Eight Is Enough," currently reads:

Section 4. Disqualifications.—

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the following offices:

- (1) Florida representative,
- (2) Florida senator,
- (3) Florida Lieutenant governor,
- (4) any office of the Florida cabinet,
- (5) U.S. Representative from Florida, or
- (6) U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

FLA. CONST. art VI, § 4.

### III. IT'S ABOUT TIME

The first question raised by the wording of Amendment #9 is one of its applicability to the legislative class of 1992. There is no question that (under the normal electoral timetable) from 1994 forward, all members of both houses will be covered. The same cannot be said for those who were voted into office in November of 1992,<sup>74</sup> and since 1992 was an apportionment year, the entire membership of both houses were elected simultaneously at that time.

To be sure, it was the intent of the framers that those elected in 1992 be covered and this desire is reflected in the language they selected to employ in the initiative's effective date clause. That language, which specified the amendment was to "take effect on the date it is approved by the electorate,"<sup>75</sup> was designed to mesh seamlessly with the language regarding legislators' terms found in article III, section 15(d), which specifies "members of the legislature shall take office upon election."<sup>76</sup>

In practice, the combined effect of these two provisions was intended to be that both Amendment #9 and the terms of those legislators elected in 1992 were to take effect and begin co-instantaneously.<sup>77</sup> Since such would

74. Under the provisions of article III, section 15(b) of the Florida Constitution, all members of the Florida House of Representatives are to be elected in each even-numbered year for a term of two years. As for the state senate, article III, section 15(a) specifies staggered terms of four years with half the members going before the voters each biennium. However, the Florida Supreme Court in *In re Apportionment Law Appearing As Senate Joint Resolution 1E*, 1982 Special Apportionment Session, 414 So. 2d 1040 (Fla. 1982), ruled that the final clause of the sub-section required all members of the senate to stand for election simultaneously if "geographic changes" had been made to their districts during an apportionment. As a practical matter, since almost by definition all senate districts will be altered geographically during any apportionment, the court's ruling requires the entire senate to stand for election every second year of every decade when the apportionment takes place.

75. See *supra* note 34 for complete text. The effective date clause is to be found in the second sub-section of the initiative and it reads as follows:

2) This amendment shall take effect on the date it is approved by the electorate, but no service in a term of office which commenced prior to the effective date of this amendment will be counted against the limit in the prior sentence.

See *supra* note 34.

76. Article III, section 15(d) of the Florida Constitution reads in full:

(d) ASSUMING OFFICE; VACANCIES. Members of the legislature shall take office upon election. Vacancies in legislative office shall be filled only by election as provided by law.

FLA. CONST. art. III, § 15(d).

77. See FLA. CONST. art. III, § 15(d). Curiously there is no exact definition of when this moment in time is though by custom the Legislature uses election day itself. However,

be the case, the reasoning ran, all legislators elected in 1992 would be bound by the limits since the simultaneous effectiveness would deprive them of the partial and temporary exemption granted to those officials (i.e., the Lieutenant Governor, members of the Cabinet, and Florida's Junior United States Senator) whose most recent terms had "commenced prior" to the amendment being approved and going into effect.<sup>78</sup> There was to be no grace period. If you were elected to the Legislature in 1992, you must, if re-elected to consecutive terms, leave the seat you won in '92 no later than the end of your term in the year 2000 when you will have served "eight consecutive years."<sup>79</sup>

On its face this all seems pretty clear, but just below the surface there exists a potential snag. The snag is built around an idea of advance notice as articulated by the Florida Supreme Court in "Footnote 32" in the similar, once celebrated, but now somewhat obscure case of *Myers v. Hawkins*,<sup>80</sup> which appears to speak directly to the exact situation the framers of Amendment #9 sought to produce: simultaneous effectiveness. Footnote 32 reads: "We express no view on the applicability of a constitutional or statutory change to persons who assume office simultaneously with the effective date of the change."<sup>81</sup>

The footnote, as many footnotes are, was intended to clarify something

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Talbot "Sandy" D'Alemberte in his commentary on section 15(d) says: "Subsection (d) clears up an area of uncertainty under previous constitutions by providing that a legislator is in office upon election. 'Upon election' would probably be the time of final canvassing of the election." 25A FLA. STAT. ANN. 669 (West 1991) (commentary to FLA. CONST. art. III, § 15(d)).

This uncertainty brings up the interesting question of whether the effective date clause in the "Eight Is Enough" initiative and the "take office" clause of article III, section 15(d), refer to the same date. For example, it could be argued that legislators elected in 1992 took office at midnight November 3-4, 1992, but that the term limit amendment did not go into effect until the complete statewide general election results were certified on November 13, 1992. If such were indeed the case, the terms of the legislative class of 1992 would have, in the words of the initiative, "commenced prior to the effective date of the amendment" and so would not be covered. See Division of Elections *supra* note 68. Citizens for Ltd. Political Terms, Initiative Petition (1992) (original petition on file with State Division of Elections).

78. See *supra* notes 34 & 63. This partial and temporary exemption was specifically provided for in the second sub-section of the "Eight Is Enough" initiative. In 1992 the lieutenant governor and all members of the Florida cabinet were in the second year of a four-year term to which they had been elected in 1990. Additionally, Florida's junior U.S. senator was then serving the fourth year of the 6-year term to which he had been elected in 1988.

79. See *supra* note 34.

80. 362 So. 2d 926, 934-35 (Fla. 1978).

81. *Id.*

the court had just ruled. In *Myers*, the case revolved around during and after term-of-service restrictions on the remunerative activities of officeholders that were placed into the constitution as a result of the 1976 adoption of Governor Reubin Askew's so-called "Sunshine Amendment."<sup>82</sup> The court had just declared the new proscriptions "should [n]ot be considered applicable to persons in office on its effective date."<sup>83</sup> In State Senator Ken Myers' instance, though he had been on the ballot at the same time as the amendment, it was relatively simple for the court to declare him (as well as others similarly situated) exempt for the time being. The out was in the dates. Mr. Myers was reelected to his senate seat and took office in November, 1976.<sup>84</sup> The amendment, approved in November, did not go into effect, pursuant to article XI, § 5(c), of the Florida Constitution until January of 1977.<sup>85</sup> Ergo, Myers and his colleagues were all in office when it became law, and therefore, he (and they) would not be covered until and unless they successfully sought reelection to their seats or election to another covered office. In the meantime the prohibitions were to apply only to those persons who, for whatever reason, entered a covered office after the amendment had become effective and before the next regularly scheduled round of elections.<sup>86</sup>

To the court, the reason the exemption was needed at all seemed to boil down to a matter of notification; of the necessity of a potential officeholder being fully apprised in advance of the rules of the game and of their effect upon him. The principal passage of *Myers* explained the rationale beginning with references to the two most closely-related cases then at hand:

A *Holley* approach focuses attention directly on the question assumed under a *Reynolds* approach—*whether the constitutional change has abolished the office, changed the qualifications for office, or imposed*

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82. *See id.* at 928. This constitutional provision is titled "Ethics in government." FLA. CONST. art. II, § 8.

83. *Myers*, 362 So. 2d at 934.

84. *Id.* at 932 n.22.

85. *Id.* at 928 n.2. Section 5(c) of the Florida Constitution reads:

(c) If the proposed amendment or revision is approved by a vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision. FLA. CONST. art. XI, § 5(c). The 1976 "Sunshine Amendment" contained no specific effective date, and so the default date specified in the above controlled.

FLA. CONST. art. XI, § 5(c).

86. *Myers*, 362 So. 2d at 935-36.

*new and onerous requirements on some or all of the incumbents who desire to continue in office.* The resign-to-run law considered in *Holley* led the Court to conclude that neither an ouster nor an impermissible burden on officeholding was imposed. The same cannot be said of [the Sunshine Amendment]. To apply newly-created professional limitations on a part-time Florida legislator in the midst of his term of office obviously defeats expectations honestly arrived at when the office was initially sought. The office itself is not abrogated or its duties altered . . . but the privileges of officeholding are no less impaired by curtailing non-legislative employment opportunities than they would be if the office was made full-time and outside employment prohibited altogether. *The abridgement in either case [of Mr. Myers' employment prerogatives] is tantamount to changing the qualifications of office. There was absolutely no employment limitation when the term of office was sought.*<sup>87</sup>

Following this comes yet a further clarification. It appears as "Footnote 38," and reads:

38. Not every statutory or constitutional impairment in the expectations or in the status of officeholders, will operate only as to future officeholders. This case does not present an occasion to announce other circumstances in which an impairment would be considered tantamount to an ouster to use the Reynolds phraseology. Wherever a line may ultimately be drawn to separate permissible impairment from that which is impermissible, it is clear that [the Sunshine Amendment] so substan-

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87. *Id.* at 934-36 (emphasis added) (citations omitted). *Holley v. Adams*, 238 So. 2d 401 (Fla. 1970), had to do with whether the state's so-called "resign to run" law was applicable to an incumbent officeholder who took office prior to its enactment. The court ruled that it was applicable because the requirements of "resign to run" were triggered by an independent decision of the officeholder himself, i.e., his decision to seek election to a post other than the one he currently occupied. *Id.* at 406. Without this decision there would have been no requirement that he resign from his current post. *Id.* at 407.

Florida *ex rel.* *Reynolds v. Roan*, 213 So. 2d 425 (Fla. 1968), had a different thrust in that it dealt with whether or not a school board could abrogate an existing fixed-term contract with its appointed school superintendent. *Id.* at 426-27. The contract had been entered into prior to the adoption of a state constitutional amendment which provided that appointive superintendents were to serve at the pleasure of their respective school boards. *Id.* In this case, the court held the new amendment could not be used as a justification for annulling the preexisting contract prior to its expiration date. *Id.* at 428. Despite the factual differences in the three cases, the central idea of advance notification of a newly imposed "change in qualifications of office" is present in all. This seems particularly so when the change imposed upon the office is self-executing and applicable without either a grace period or an independent trigger-pulling action of the affected officeholder. *Myers*, 362 So. 2d at 934-36.

tially abrogates Myers' status as a part-time legislator and as a member of the Florida Bar that it would fall well outside the established boundary.<sup>88</sup>

Considering the above in light of Eight Is Enough and taking into account that the *Myers* court held the Sunshine Amendment restrictions were "tantamount to changing the qualifications of office,"<sup>89</sup> and that the justices spoke of the limitations as not being in place when the office was both "initially sought"<sup>90</sup> and "sought,"<sup>91</sup> one must wonder about the situation presented with regard to term limits. First, these would seem to represent the flip-side of the *Myers* coin.<sup>92</sup> Second, when one views term-limits in the morning sans their makeup, they are not, it would seem, merely "tantamount" to a qualifications change. They are the genuine article albeit cast in looking-glass terms as a kind of "disqualification."<sup>93</sup> Third, the limits were plainly not in place in the constitution when the legislators elected in

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88. *Myers*, 362 So. 2d at 935 n.38.

89. *Id.* at 935.

90. *Id.*

91. *Id.* at 928 n.1, 932 n.22. The court's use of the qualified term "initially sought" in one place and the unqualified term "sought" in another place is interesting but, more than likely meaningless. This is so because in two footnotes the court specifically referred to Mr. Myers' tenure in the Senate. In the first instance the court stated, "Myers, who was first elected to his senatorial seat on November 5, 1968." *Myers v. Hawkins*, 362 So. 2d 926, 928 n.1 (Fla. 1978). In the second instance, it referred to this again by stating, "as noted earlier, Myers has served in the Florida senate continuously since 1968. His present four-year term began on November 2, 1976." *Id.* at 932 n.22. These references, when combined with differing presentations of the term "sought" raise the question of whether the justices had two different things in mind, i.e., one's first election to an office as opposed to one's subsequent reelection to that office. Were such the case then it may be that an officeholder's "expectations" could be developed over time to such a degree that a long-term incumbent's "expectations" about his/her office, his/her tenure in that office, and his/her prerogatives while in the office could weigh heavier than would those of a newly elected first-time officeholder when a significant change in rules of the game are made.

92. They both, after all, deal with the affected individuals' employment options and with restrictions thereon. *Myers* deals with the impact on an individual's primary occupation of restrictions imposed as a result of his part-time job. The term-limits amendment creates new restrictions on an individual's ability to continue to hold the part-time job itself, the holding of which will result in restrictions being placed on his/her present and, for a limited time, his/her future employment options.

93. Despite its placement, the language added to the Florida Constitution by "Eight Is Enough" has the practical effect of placing the language "and shall not by the end of the current term have served (or, but for resignation, would have served) in the office for eight consecutive years" in every list of qualifications for every covered office. See FLA. CONST. art. VI, § 4(b) (amended 1992).



1992 “sought” office<sup>94</sup> nor was the Eight Is Enough initiative even officially certified to the ballot when they signed up and paid their generally non-refundable fees.<sup>95</sup>

Given the above, a question presents itself for consideration: Is the effect of this immediate imposition of a “change in qualifications of office” via term limits with no grace period a “burden” which is “onerous”<sup>96</sup> enough to trigger a *Myers*-style analysis? One can, after all, with only slight effort, posit arguments and questions tending toward the affirmative. For example, the new restrictions can easily be cast as an “ouster.”<sup>97</sup> A slow-motion “ouster” to be sure, but an “ouster” nonetheless. This is

94. See FLA. CONST. art. VI, § 5 (amended 1992), which specifies that general elections in the state are to be held on “[t]he first Tuesday after the first Monday in November of each even-numbered year . . . .” *Id.*

The Florida Statutes specify that the first primary election shall be held on the Tuesday which falls nine weeks prior to the date of the general election. FLA. STAT. § 100.061 (1991).

The Florida Statutes specify that the qualifying period for state-level officials shall be from noon of the 50th day until noon of the 46th day prior to the date of the first primary election. FLA. STAT. § 99.061(1) (1991). Another section specifies that in apportionment years (the second year of each decade) the qualifying period for Florida federal officials shall be from noon of the 57th day until noon of the 53rd day prior to the first primary election. FLA. STAT. § 99.061(8) (1991). In all other years, the qualifying period for Florida federal officials is governed by section 99.061(1) which specifies the qualifying period for those offices to be from noon of the 120th day until noon of the 116th day prior to the first primary. FLA. STAT. § 99.061(1) (1991).

Taking all of the above into account, one can calculate exactly when the official periods of “seeking” office occurred in 1992. As it was an apportionment year, the period for Florida federal officials ran from noon on Monday July 6, 1992 until 7:00 p.m. EST/CST (depending upon the time zone(s) the election district was located in) on Tuesday November 3, 1992. For state-level officials the official period of “seeking” ran from noon on Monday July 13, 1992 until 7:00 p.m. EST/CST (depending upon the time zone(s) the election district was located in) on Tuesday November 3, 1992. “Eight Is Enough,” therefore, could not, even under the most liberal view, have become a part of the Florida Constitution and taken effect until after 7:00 p.m. CST (8:00 p.m. EST) when the polls officially closed in the far western panhandle and the electoral “seeking” was officially over in the State.

95. *Id.*; see *supra* note 63. The “Eight Is Enough” initiative was officially granted a place on the November 3, 1992 general election ballot as “Amendment # 9” on Thursday July 23, 1992. This was six days after the period for qualification had closed for state-level offices and 13 days after the end of the sign-up period for Florida federal offices. Section 99.092(1), states that candidates, may only withdraw and receive a refund of their fees if they withdraw prior to the last day of the qualifying period for the office they are seeking or if they die prior to an election being held. FLA. STAT. § 99.092(1) (1991).

96. See *Myers*, 362 So. 2d at 934-35; *Holley*, 238 So. 2d at 401.

97. See *Myers*, 362 So. 2d at 934-35; *State ex rel Reynolds*, 213 So. 2d at 425.

especially true in the case of long-term incumbents whose lives have come to be arranged around their service, given the observable fact that the nature of state legislative service in Florida has changed drastically since 1976, it now being essentially a full-time job.<sup>98</sup>

Putting this another way, did the public really know they were voting to throw out Senator Faugbunde even as they were voting to throw him back in for the umpteenth time? How did the voters, after all, interpret the partial exemption in the initiative? Would Ms. Wellmeaning have made the decision to bear the considerable sacrifices inherent in a run for the Legislature in 1992, if she had known her stay would be so relatively brief that any real shot at obtaining a position of leadership was effectively foreclosed in advance due to the presence of individuals with long tenure who were already lined up for important leadership posts? And how about Mr. Activisté, would he have decided to run for a time-gobbling, relatively low-paying, term-limited, state legislative seat? Might he have chosen instead to seek a seat on his county commission? Might he have chosen not to run at all and to spend his time tending to his "civilian" business or job? Following this line of argument, it may not have been sufficient for the "newly created"<sup>99</sup> change in qualifications to merely be on the ballot or apparently headed for the ballot, when the affected office was being "sought."<sup>100</sup> It must, it suggests, be there in advance if the notice requirement of *Myers* is to be satisfied.

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98. ALLEN MORRIS, THE FLORIDA HANDBOOK: 1991-1992 101 (23rd ed. 1991). One way to illustrate this change in character is to look at the number of special legislative sessions. According to Legislative Historian, Dr. Allen Morris, prior to the arrival in Tallahassee of Governor Claude Kirk in January 1967, special sessions were relatively rare. In fact, in the 98 years between 1869 and 1967 there had been but 28 such sessions. With Kirk however, the pace picked up and, after the onset of annual regular sessions and the putting into place of a permanent staff structure, the number of special sessions essentially exploded. Between 1967 and the end of 1990, there were 48 special sessions.

Today the special session is more or less a given. There will be at least one and usually more every year. Too, even absent formally called special sessions, there has been a dramatic increase in committee work as each committee essentially functions year-round with meetings being held at least once a month even when the legislature is not formally meeting. The upshot of these changes is that present-day legislators must be ready to drop everything and run to Tallahassee at almost any time besides planning to be there full time for both the 60-day regular session each year and the week's worth of committee meetings held almost every month. It is a far cry from the once-every-two-years, single, 60-day regular session of but 25 years ago, and every year the work load, as well as the time required to handle the load, increases.

99. *Myers*, 362 So. 2d at 935.

100. *Id.*

Using the cases of the Sunshine Amendment and Eight Is Enough as exact examples, if mere presence on the ballot or reports of a successfully proceeding petition drive were sufficient to provide the quality of notice the *Myers* court seemed to demand, then the argument available to the backers of the Sunshine Amendment would have been the strongest possible one to advance. After all, it was the brainchild of an extremely popular, sitting, second-term Governor. The Governor partially drafted the amendment, launched and headed its petition drive, and once placed on the ballot, he flogged the amendment's passage before the public.<sup>101</sup> This was not the case with Eight Is Enough. It was imagined, drafted, petitioned for, and flogged by a group of individuals none of whom possessed either the proven current popularity, nor the level of simple public recognition as had Governor Askew. So, if the Askew initiative did not apply in part to those officeholders who "sought" office at the same time the initiative "sought" passage, because it was not in place as a functioning portion of the constitution when all the "seeking" was a-progress; how, one must wonder, is it that term limitations could be held to apply to those who were "seeking" office at the same time the term limitation amendment was "seeking" passage? This seems both a good question and a hard one to answer as the court in *Myers* itself indicated.<sup>102</sup>

Aside from simply being a good question, it is also one which provides a possible opportunity for the court to hone its decision in *Myers*. Answering this question will not only clarify the status of the legislative class of 1992, but it will edify the backers of future constitutional or statutory changes who may wish to modify the rules applicable to one of the most basic institutions in the game of representative democracy as practiced in Florida. Such a sharpening would be entirely consistent with the *Myers* court's message in Footnote 38.<sup>103</sup>

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101. See *Williams v. Smith*, 360 So. 2d 417, 418-19 (Fla. 1978) (discussing the Governor's role); see also *Myers*, 362 So. 2d at 928.

102. *Myers*, 362 So. 2d at 932. It should be pointed out this area of inquiry was entered into at the request of the court itself. In a footnote, the court stated that, "although this issue [i.e., the issue of the timing of the Sunshine Amendment's applicability] was not originally argued by the parties, the Court on its own motion directed that the parties file supplementary briefs addressing the question." *Id.* at 932 n.22.

103. *Id.* at 935 n.38.

#### IV. FUN WITH NUMBERS IN THE FLORIDA STATE SENATE

Let us now turn to the second kink in Eight Is Enough, and as we do, let us assume for the sake of argument and ease of illustration that it applies to all those members elected to the Legislature in 1992. Let us also stipulate that from here on we shall be talking only of the State Senate. Given these stipulations, let us now assert that the second problem may be considered the real problem with the amendment, because if nothing is done, its consequences shall, without question, be felt. This is because, to put the matter simply and in the extreme vernacular, term limits don't work right in the senate 'cause they was borned broke.

The reason why this kink developed and not raised appears to be the result of an oversight. Specifically, the proponents forgot at every level of the initiative's development and review that an aspect of Florida constitutional law functions vis à vis the Senate as the equivalent of, say, the Infield Fly Rule.<sup>104</sup> The rule in question is suitably muddy. Put into baseball

104. The "Infield Fly Rule" was brought into being by the combined action of four separate items over a 12-year period. First, by the provisions of article III, section 15(a) of the Florida Constitution, which reads:

(a) SENATORS. Senators shall be elected for terms of four years, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four; except, at the election next following a reapportionment, some senators shall be elected for terms of two years when necessary to maintain staggered terms.

FLA. CONST. art. III, § 15(a).

Second, by the provisions of article XII, section 12 which provides:

Section 12. Senators.— The requirement of staggered terms of senators in Section 15(a), of Article III of this revision shall apply only to senators elected in November, 1972, and thereafter.

FLA. CONST. art. XII, § 12.

Third, by the ruling of the Florida Supreme Court in *In re Apportionment Law* Appearing As Senate Joint Resolution 1 E, 1982 Special Apportionment Session, 414 So. 2d 1040, 1045-50 (Fla. 1982) [hereinafter *In re Apportionment Law*], which declared that if during any apportionment "geographic changes" were made to any senate district, its incumbent must then run for reelection whether or not his/her four year term was set to expire that year. Further, if all senatorial districts were geographically altered, then all members of the senate must run in that year. *Id.*

Fourth, by the ruling of the court also found in *In re Apportionment Law*, 414 So. 2d at 1050-51, wherein the justices defined what was meant by the constitutional phrase "consecutively numbered . . . districts." In pertinent part the text of this portion of the decision read:

The second issue . . . concerns the construction of a portion of the lan-

terms, it runs as follows: Despite what the rule book seems to say, players do not always seek four-inning contracts. Sometimes it's two. Moreover, who seeks what and when depends upon the number on their jersey, the time of their initial at-bat, and whether the at-bat occurred during an "In" or "Out" inning. Provided, however, that the specific application of the preceding is subject to modification each tenth inning, when such numbered jerseys, as are authorized under the rules, may be freely exchanged among players.<sup>105</sup>

It is fairly plain that this particular quirk in how the system operates was simply overlooked. It was not raised during the campaign for the amendment's approval, nor in any of the filings related to the court's

guage of article III, section 16(a), and whether, as written, the language requires each senate and house district to be both contiguous within itself and that each district must also be contiguous with the next consecutively-numbered district. The house of representatives [argues] . . . that the numbered districts must be adjacent to each other in numerical order . . . .

[I]t is the position of the house that a distorted numbering pattern had developed under the constitution of 1885, and in its view it was probable, in an effort to avoid such distortions, that the phraseology, "consecutively numbered senatorial districts of either contiguous, overlapping or identical territory" was placed in the present constitution. The house argues that the requirement for contiguous territory refers not only to the territory within each district, but to the relationship of the districts to each other, and must be read in *pari materia* with the requirement for consecutive numbering. It follows from this construction that each district for the house and for the senate must, therefore, be contiguous with the next consecutively numbered district. In the house's view, the purpose of the provision is to prohibit a distorted numbering which would serve the interest of individual senators or representatives.

It is the senate's position, supported by the attorney general, that the provision of article III, section 16(a), requires only that district numbers be consecutive and that the territory within each district be contiguous. They argue that a strict grammatical reading of the sentence in article III, section 16(a), supports the conclusion that the words "consecutively numbered" appear to modify the noun "districts," and the word "contiguous" modifies the noun territory.

We agree with the senate and the attorney general that the plain language of article III, section 16(a), does not modify or limit the word "contiguous" or "territory." Even if the drafters had intended that each district be contiguous with the next consecutively numbered district, as contended by the house, that is not what they grammatically wrote. We conclude that we must interpret the constitutional provision as it has been grammatically written . . . .

*In re Apportionment Law*, 414 So. 2d at 1050-51 (citations omitted).

105. *Id.*

consideration of the term limit initiative's fitness for inclusion on the ballot. In addition, neither the majority opinion in its *Advisory Opinion To The Attorney General—Limited Political Terms In Certain Elective Offices*<sup>106</sup> nor either of the two partial dissents mention it. In fact, the ruling of the majority asserts:

The proposed amendment does not change or affect the age or residency requirements of article III, section 15 (state legislators). . . . Further, should the proposed amendment be approved by the voters, *state senators will still be elected for four-year terms and state representatives for two-year terms* as provided in article III, section 15.<sup>107</sup>

Moreover, to the preceding may be appended an illustration used by Justice Kogan in his separate opinion:

For example, voters might decide that the advantages outweigh the disadvantages on the question of term limitations for state legislators. This is because the *delegations from all portions of the state will be treated equally in the statehouse. No geographical region would suffer any disadvantage with respect to any other region. The rules of the political game in Tallahassee would be the same for everyone.*<sup>108</sup>

To put it simply, this is wrong. In the first place, due to the Infield Fly Rule, many senators contract with the electorate for some combination of two and four year terms, and two plus four equals six, a number not divisible evenly into eight. Secondly, because under Eight Is Enough selected players will be entitled to play extra innings, delegations will be treated differently. Some delegations will, therefore, be more equal than others. Consequently, "the rules of the game"<sup>109</sup> shall most assuredly not be the same for all. An explanation follows. Gather 'round the plate.

The master interval of time around which the Florida State Senate is organized is the decennium. By the provisions of article III, section 15(a),<sup>110</sup> and article XII, section 12,<sup>111</sup> as interpreted by the Florida Supreme Court in *In re Apportionment Law*,<sup>112</sup> the Senate decennium begins

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106. 592 So. 2d 225 (Fla. 1991).

107. *Id.* at 228 (emphasis added).

108. *Id.* at 232 (emphasis added).

109. *Id.*

110. See *supra* note 104.

111. See *supra* note 104.

112. 414 So. 2d at 1040 (Fla. 1982).

and ends in each year numbered "2" when, pursuant to article III, section 16(a), apportionment is undertaken.<sup>113</sup> If during that process "geographic changes"<sup>114</sup> are made in a given senate district, then the constitutionally mandated term of four years must, if not expiring of its own in that year, be "truncated"<sup>115</sup> so that the senator may be "elected from" the "new" district.<sup>116</sup> Further, when "all senate districts have been changed [the]

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113. Article III, section 16(a) of the Florida Constitution reads in pertinent part:

(a) SENATORIAL AND REPRESENTATIVE DISTRICTS. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

FLA. CONST. art. III, § 16(a).

114. *In re Apportionment Law*, 414 So. 2d at 1047-48. The key passage reads:

We hold, consistent with the views of the house of representatives and Common Cause, that the Florida Constitution, by its provisions, requires, upon reapportionment, that senate terms be truncated when a geographic change in district lines results in a change in the district's constituency. Because the new plan alters all district lines and the constituency therein, elections must be held in all senate districts in 1982.

*Id.* (citations omitted).

115. *Id.*

116. *Id.* at 1049-50. The key passage treating with the notion of "elected from" reads:

The principle that holdover senators represent the newly drawn geographic districts requires us to answer the question of how a senator elected from a former district apportioned in 1972 would meet the requirement of section 1, article III. That section mandates that the senate be "*composed*" of one senator "*elected*" from each senatorial district. Given this provision, it necessarily follows that, since none of the senate districts from which senators were elected in 1980 are preserved intact (because all senate districts have been changed by the new apportionment plan), no senators elected in 1980 were in fact elected from the senatorial district which they now propose they should represent. In our view, the senators could be deemed elected from those districts only if they had been elected from the specific districts set forth in the 1982 apportionment plan. By this, we mean that their specific districts, from which they were elected in 1980, had not been changed geographically by the 1982 plan. We do agree that when a senate district is carried forward with no geographic change in boundary lines, article III, section 1, is satisfied, and there is no need to implement the exception provision of section 15(a). On the other hand, where, as in the instant case, all senate districts have been changed, we conclude that our constitution requires all senators to stand for election in order to be "elected from" the new districts.

Constitution requires that all senators stand for reelection.”<sup>117</sup> Under the formula for such elections given in article III, section 15(a),<sup>118</sup> when this takes place, some senators seek election to four-year terms while others run for two-year terms. This is done in order to satisfy section 15(a)’s final requirement that senate terms be “staggered” so that half the membership goes before the voters every two years.<sup>119</sup>

The Senate objected in 1982 to the truncation of terms. It contended that mandatory wholesale truncation was intended by the 1968 framers to apply only in 1972 as provided in article XII, section 12, as a method of restaggering the senate. (It had been left unstaggered as a result of the apportionment battles of the 1960’s which concluded with the simultaneous election of all senators in 1968). It further argued that after 1972, truncation was only to be utilized as necessary for a seat here and there following subsequent apportionments to maintain the staggered feature. Despite the Senate’s objections, the court ruled otherwise.<sup>120</sup>

The court disagreed as well with the Senate’s contention that, notwithstanding the addition or subtraction of territory and peoples to or from a given district during an apportionment, a senator in the middle of his or her constitutionally prescribed four-year term in the apportionment year should be allowed to “holdover” and complete the term prior to having to stand for election in the newly aligned district.<sup>121</sup> The justices on a five to two vote ruled such “holdovers” would violate the provision that each member of the body be “elected from” his or her district. If a district encompassed new territory, said the court, one had to run in it in order to be “elected from” it. One could not simply be assigned to it during apportionment and have that count as an “election.”<sup>122</sup>

In the context of 1982 this decision made some sense; it was at least popular.<sup>123</sup> The only people at all miffed were some of the twenty

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*Id.*

117. *In re Apportionment Law*, 414 So. 2d at 1049-50.

118. *See supra* note 104.

119. *See supra* note 104.

120. *In re Apportionment Law*, 414 So. 2d at 1045-50.

121. *Id.*

122. *Id.*

123. It may be said with significant confidence that a good portion of the decision’s popularity stemmed from the identity of the leader of the pro-holdover faction. This man, Senate Dean Dempsey J. Barron (D-Panama City) was both revered and feared in the Capitol for his power. To “beat” him on any issue was notable, but to “beat” him on something he personally cared about—and there were relatively few issues of this sort Barron being notorious for not having issues with his name visibly written on them—was worthy of great



would-be “holdovers” and their close supporters.<sup>124</sup> On the other hand, a host of individuals and groups were delighted and no doubt would have been howlingly indignant if the matter had gone the other way.<sup>125</sup> It really was, given the humid political atmosphere, no contest. Unfortunately, no one could then have known that just a decade later this popular, right-thing-to-do position would turn out to be one which would yield not a fairer, more representative Florida Senate, but rather a Florida Senate soon to be characterized by lurching inequity.

To explain: Article III, section 15(a) in combination with article XII, section 12, specifies that from 1972 forward, senators from odd-numbered districts are to run for four-year terms in each even year which is a multiple of four, and senators from even-numbered districts are to run for 4-year terms in each even year which is not a multiple of four. The former subsection also gives the Legislature the power to shorten the term for which a given senator, or group of senators, will run to accommodate the goal of staggered elections.<sup>126</sup>

In 1972, a year which was a multiple of four, the Legislature obeyed article III, section 15(a), and article XII, section 12, and declared that all senators from even-numbered districts would run for initial terms of two

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celebration in the eyes of many.

124. See generally P.C. Doherty, *Development and Impact of Legislative Involvement on Selected Aspects of State University System Operations: 1954-1990* (vols. 1-6) (1991) (unpublished Ph.D. dissertation, Florida State University (Tallahassee)). Not all of the potential holdover senators were upset. The 1980-1982 biennium was the most politically volatile period in recent memory in the state senate and had as its centerpiece a running, often bitter, feud between Senate Dean Dempsey J. Barron (D-Panama City) and his erstwhile protégé, Senate President W.D. Childers (D-Pensacola). The battle essentially consumed the Senate and caused it to divide along pro-Barron and anti-Barron lines rather than the more traditional ones of party or ideology. More than one of the anti-Barron senators occupied odd-numbered seats and were, therefore, potential holdovers. Yet these people were just as happy as any to see him and his pro-holdover position bested. In fact, Senator W.D. Childers, the occupant of the district one seat, and, hence, a potential holdover himself, openly declared early on that he would stand for election in 1992 regardless of whether he was required to do so or not.

125. *Id.*; see also *In re Apportionment Law*, 414 So. 2d at 1040. Aside from the House of Representatives, the two most vocal opponents of holdover senators were Common Cause and The League of Women Voters. Each joined the suit to strike the provision. In addition Governor Bob Graham, a long time political opponent of Mr. Barron, weighed in forcefully on the anti-holdover side as did the bulk of the state's media outlets who, it may be fairly said, wasted few opportunities to vigorously oppose both the Dean personally as well as virtually anything he even seemed to be supporting.

126. See *supra* note 104.

years in order to put the staggered terms feature into effect.<sup>127</sup> Thereafter, all senators were to run for terms of four years unless some sort of adjustment was required to maintain the integrity of the staggered terms provision. If this occurred, the Legislature could once again declare that certain senators' terms would be "truncated." "Truncation," however, was seen as being applicable only to the odd case. The assumption was that, from 1974 forward, all members of the Senate would run for four year terms.<sup>128</sup>

The above assumption held true only until 1982 when the court in *In re Apportionment Law* ruled that "truncation" was to be a regular and continuing feature of Senate terms and that every apportionment year was to be the start and finish of a discreet Senate decennium.<sup>129</sup> This decision did more than simply declare that under normal circumstances all senators must run after apportionment whether their terms have expired or not. It also, though it was not so noted, created two types of apportionment decades and mirror-image term patterns for odd and even numbered seats.

For the sake of convenience, let us call the two decade types (and the years they contain) "In Decades" (years) and "Out Decades" (years). "In Decades" are those which are identical in electoral pattern to the first decade, 1972-1982 (inclusive), under the 1968 revision and are characterized by having an initial year which is a multiple of "4." "Out Decades" are those which are identical in electoral pattern to the second decade, 1982-1992 (inclusive), under the 1968 revision and are characterized by having an initial year which is not a multiple of "4." As these two decade types alternate, it can be projected that for the Fifty-year period between 1992 and 2042, the distribution will be as follows:

"In Decades": 1992-2002; 2012-2022; 2032-2042 (all inclusive).

"Out Decades": 2002-2012; 2022-2032 (both inclusive).

Whether a decade is "In" or "Out" is of importance because it determines what term pattern a given Senate seat must observe. During "In Decades," odd-numbered seats follow (beginning in the year "2" and ending ten years later in the next year "2"), the pattern 4 + 4 + 2, while even-numbered seats follow the pattern 2 + 4 + 4. The patterns are reversed during

127. *In re Apportionment Law*, 414 So. 2d at 1045-50.

128. *Id.*

129. *Id.* The court nowhere used the term "discreet decenniums." However, the concept was clearly embodied in its decision, and, in practical terms, were exactly what was created. *Id.*

“Out Decades” with odd-numbered seats running for terms of  $2 + 4 + 4$  and even-numbered seats for terms of  $4 + 4 + 2$ . If one takes these numbers and extends them out over the entire fifty years (1992-2042) the sequences which emerge are:

Odd-Numbered Seats:  $4+4+2 \mid 2+4+4 \mid 4+4+2 \mid 2+4+4 \mid 4+4+2$

Even-Numbered Seats:  $2+4+4 \mid 4+4+2 \mid 2+4+4 \mid 4+4+2 \mid 2+4+4$

Intrinsically, there is no particular problem with this arrangement. Once every twenty years, each odd-numbered seat and each even-numbered seat sees one of its four-year terms broken into two two-year terms. The two-year terms always run back-to-back, and are always followed by a stretch of four consecutive four-year terms before the  $2 + 2$  pattern must again be observed. It seems a ducky design . . . but it is not.

It is not ducky because the scheme proceeds from an erroneous implied assumption thereby concealing within the folds of its truncations seeds of doom. The assumption is that odd-numbered seats will always be odd-numbered seats and even-numbered seats will always be even-numbered seats. This is not true because numbers change.<sup>130</sup>

In 1982, the Florida Legislature’s legendary “Dean,” Senator Dempsey J. Barron (D-Panama City), declared that senators like himself from odd-numbered districts, who had been elected in 1980, should continue in office, notwithstanding apportionment, until 1984. One man, Representative H. Lee Moffitt (D-Tampa), the incoming Speaker of the House, disagreed with the powerful and much-feared Barron and made the disagreement his

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130. *Id.* at 1050-51; *see supra* note 104. The numerical designations of legislative seats may be moved about at will during an apportionment so long as each Senate seat bears a number between one and forty (inclusive) and each House seat bears a number between one and one hundred and twenty (inclusive). Indeed, in the next apportionment year, 1992, seat numbers went gamboling far and wide especially in the Senate. For example, in 1990 Senate district “7” was located in the far northeast region of Florida, including Nassau and part of Duval counties (suburban Jacksonville), while Senate district “2” was in the panhandle, running from the Escambia/Santa Rosa County line to Tallahassee. After the 1992 apportionment, however, Senate district “7” had hopped better than 200 miles west to the coastal areas of Escambia, Santa Rosa, Okaloosa, Walton, and Bay counties in the far reaches of the western panhandle and Senate district “2” had migrated 200 miles east to northeast Florida.

The situation was not so pronounced in the House although even there, in contrast to earlier practice, the numerical designations of many seats were changed. In 1982, it had been virtually an article of faith in the House that a member should, if at all possible, be allowed to keep his/her seat number even if his/her territory had changed.

reason for living.<sup>131</sup> So began The Great Battle of Wills which ended when the State Supreme Court declared that the terms of the odd-seat senators were to be truncated in 1982. Thus were discreet decenniums, “In” and “Out” decades, and 2 + 4 + 4 and 4 + 4 + 2 term patterns born. T’was a Famous Victory.<sup>132</sup>

Barron and Moffitt were gone by 1992,<sup>133</sup> but an echo of their combat carried forward. The apportionment year of 1992 was the start of the “In Decade” of 1992-2002. As such it was to be the occupants of the even-numbered seats who faced 2 + 2. But Senators can add, so, when the apportionment process was undertaken, seat numbers changed. As a result, when the distribution ended, more than one lucky senator who had filled an even-numbered 2 + 2 seat in the spring found himself scheduled to seek an odd-numbered 2 + 4 seat in the fall. The pattern had been shattered. A simple change in a seat’s numerical designation was all that was required to change 4+4+2 | 2+4+4 into 4+4+2 | 4+4+2. The Time-Shifting Gerrymander had awakened: Even numbers became odd; two became four.<sup>134</sup>

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131. Telephone Interview with Ralph H. Haben, Jr., former Speaker of the House, *Florida House of Representatives* (Jan. 1990); Doherty, *supra* note 124.

132. *Id.*

133. Mr. Moffitt retired from the Legislature in November, 1984 following his term (1982-1984) as Speaker of the House of Representatives. Mr. Barron was defeated for reelection in 1988 and retired from politics at that time. In Mr. Barron’s case, the retirement came after a legislative career spanning some 32 consecutive years, 28 of which (1960-1988) were spent as a member of the Senate. Mr. Moffitt retired after having served 10 consecutive years in the House.

134. OFFICE OF THE CLERK, THE FLORIDA HOUSE OF REPRESENTATIVES, THE CLERK’S MANUAL 1980-1982 (1981); OFFICE OF THE CLERK, THE FLORIDA HOUSE OF REPRESENTATIVES, THE CLERK’S MANUAL 1982-1984 (1983); OFFICE OF THE CLERK, THE FLORIDA HOUSE OF REPRESENTATIVES, THE CLERK’S MANUAL 1990-1992 (1991); OFFICE OF THE CLERK, THE FLORIDA HOUSE OF REPRESENTATIVES, THE CLERK’S MANUAL 1992-1994 (1993). To illustrate this point by way of contrast, in 1982, when the senate was operating under the assumption that holdover senators were permitted, only one seat held by an incumbent who returned for the next biennium was given a new numerical designation. This individual, Senator Pat Thomas (D-Quincy), saw his seat number change from “4” to “2.” The change was made necessary because a population shift east and south caused the panhandle region to lose a Senate seat. However, it is to be noted that despite the numerical change, Senator Thomas still occupied an even-numbered seat after reapportionment which meant that in the election of 1982 he ran for a full four-year term.

In 1992, the next apportionment after the court ruled holdover senators impermissible except in very limited and very unlikely circumstances, a radically different situation occurred. Of those 21 senators present for apportionment in 1992 who returned to office in the fall, nine who had odd numbers going into apportionment kept them and so ran for full four-year terms, five who had gone into apportionment with even numbers kept them, and

Still, despite this change, the overall system could have worked. There is no real inequity in it; it is only politics. However, to have worked, it was necessary for the rules to remain static, which they did not. Phil Handy appeared with Eight Is Enough, and, for the second time in as many decades, changed the rules of the game. No good was thereby done.

The basic problem with Eight Is Enough when it is imposed upon the rules of 1968,<sup>135</sup> as modified in 1982,<sup>136</sup> is that it can only work if two highly unlikely scenarios occur in combination. First, the Senate must forget how to make odd numbers even and even numbers odd. Second, all Senators must serve the maximum time allowed. If these two things do occur, then, after the initial "tail" of two years extra eligibility which will apply to those even-seat senators elected in 1992 has been dispensed with, the eight-year limit will work for all. Figures # 1 (odd seats) and # 2 (even seats) illustrate this.

Figures # 3 (odd seats) and # 4 (even seats) by contrast illustrate what will happen if only one of the above two conditions prevail, i.e., if all senators serve the maximum time allowed. Should this come to pass, and the Senate continues to change numerical seat designations each apportionment year, the result will be a "Grand Manipulation." All Senate seats will become ten-year seats except for those odd-numbered seats elected in 1992, and those even-numbered seats whose occupants are first elected to the Senate in 1994. The holders of these seats would be restricted to eight years. It is ironic that one of these two groups is the same one which, via numerical manipulation, had been the winner under the 1982-1992 rules.

As illustrative as the above are, neither the perfect alignment necessary for Eight Is Enough to work nor the situation necessary to make the Grand Manipulation function are likely. They are both too rigid. Deviation causes them to splinter. Therefore we must analyze the problem arithmetically. People come and go in the Senate each and every election year, so we must approach the effect of the term-limit amendment from that vantage point. We must also, for the sake of comprehensibility, leave out any consideration

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so, ran for truncated two-year terms, and six who had gone into apportionment with even numbers came out of it with odd numbers, and so, ran for full four-year terms instead of truncated two-year terms. Only one senator (Bill Bankhead, R-Jacksonville) went into apportionment with an odd number and came out with an even number, and so, saw the term he was permitted to seek in the fall shortened from four years to two.

135. See *supra* note 104 for full texts of the rules of 1968 as embodied in article III, section 15(a), and article XII, § 12 of the Florida Constitution.

136. See *supra* notes 104, 114, and 116 for pertinent text of rulings.

of the effect service in a partial term might have.<sup>137</sup> Let us begin this by looking at four straight-line situations. By straight-line we mean that no change from even to odd or vice versa is made in a seat's designation during an apportionment.

During "In Decades," there are three elections held to fill odd-numbered Senate seats. As shown in figure # 5, all result in eight-year seats if there is no change in the numerical designation.

The same cannot be said, though, with regard to those odd-numbered seats to which senators are elected during "Out Decades." As shown in figure # 6, during these decades there are also three opportunities for odd-numbered seats to be filled, but only two classes yield eight-year seats. Membership in the third class brings ten years of eligibility. Also, the ten-year class of seats are what may be termed "Natural 10's." They cannot be eliminated. They will crop up, without any help from politics, each and every "Out Decade."

As expected, the mirror-image situation obtains with regard to the even-numbered seats. Whether beginning in an "In Decade" or an "Out Decade," the members of all classes except one will be eligible to serve eight years. This exceptional class will always be entitled to sit for ten years.<sup>138</sup>

Taking the above down, as it were, to the floor of the Florida Senate, it is important to look hypothetically at what effect Eight Is Enough would have produced in 1992 had it been in effect prior to that year. In 1992, the initial year of the "In Decade" of 1992-2002, the Senate saw a heavy turnover as it will from time to time. When the dust had settled, almost half (nineteen) of the seats were occupied by new, first time, members. Of these nineteen new members, thirteen had been elected to even-numbered seats. Therefore, all thirteen would be "Natural 10's," and, hence would be eligible to serve for ten years while their six new odd-numbered seat colleagues who were elected at the same time would be restricted to eight years of eligibility. Their more senior colleagues, of course, would have available to them varying lengths of time based upon the number of years they had served prior to 1992.

If theory is important reality is more so. Therefore, if we presume Eight Is Enough went into effect simultaneously to the 1992 election, that it covers all forty senators now sitting, and that it exempts all pre-No-

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137. See Sowinski *supra* notes 3; see also *supra* note 32. Partial term service was deemed sufficiently rare by the framers of Eight Is Enough to permit their ignoring its possible impact on their plan.

138. See Figures # 7 and # 8.

vember, 1992 Senate service, then fully one-half (twenty) of the present members are eligible to stay for ten consecutive years. The other half of the Senate is not so fortunate. They must leave office upon the completion of eight years.

Given the above, whither Eight is Enough? Gone, or nearly gone, as the saying goes, to where the Woodbine twineth. Moreover, the kind of arrangement left behind by its departure for the Woodbine simply reeks of inequity. Perhaps such asymmetry is not per se unconstitutional, but it surely smells funny when applied to theoretically "equal" members of the same chamber who are supposed to represent theoretically "equal" districts. The fact is that he who can serve ten years will be more equal than he who can serve but eight, no matter how the issue is presented. To assert otherwise is to beggar common sense.

Worse still is the fact that the parade of horrors does not end with simple asymmetry. One must also consider the effect on a seat and its occupant of any switch in his or her designation from odd to even or even to odd during an apportionment. This is where the real fun starts; where the New and Improved Gerrymander can be loosed to fly through time.

Employment of the Time-Shifting Gerrymander as a political weapon can be readily seen in figures # 9, # 10, # 11, and # 12. These diagrams show it to be a weapon of enormous potency because these "Petit Manipulations" can shorten or lengthen most members' maximum tenure. Also, in the case of seats soon to be open as a result of retirement from the body (mandatory or otherwise), or in the case of seats made vulnerable to the present incumbent via the normal partisan give and take of apportionment the Time-Shifting Gerrymander may be used to pave the way for either an eight or ten-year replacement. This is powerful stuff—constitutionally enshrined institutional asymmetry joined at the hip with political jiggy-pokery. It is difficult, if not impossible, to believe this result is what the term limit proponents had in mind. Yet, it is equally plain this is exactly what they wrought.

So to quote an age-old refrain of the Russian intelligentsia, "What is to be done?"<sup>139</sup> There is no judicial guidance available on the point as it would seem this particular situation is a new one and, hence, unadjudicated.<sup>140</sup> Therefore, something new will have to be tried, or, to quote a

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139. Gary Saul Morson, *What is the Intelligentsia? Once More, An Old Russian Question*, ACADEMIC QUESTIONS, Summer, 1993, 20-38.

140. *In re Apportionment Law*, 414 So. 2d at 1047. The complicating factor here is the matter of truncation. As the court noted, no other jurisdiction has a provision such as the one found in Article III, section 15(a) of the Florida Constitution which contains the "exception"

famous English export, we will have to “let it be”—an alternative that seems as unlikely as it is unattractive. While a number of possible solutions come to mind, most would require adding to the confusion by repeating the amendatory process to make the constitution’s provisions regarding Senate numerical seat designations and/or terms square with those requiring consecutive years of service be limited. And even were this tried, great care; perhaps, given what has happened here, excessively great care; would have to be taken lest the balloon pop out elsewhere unexpectedly.

Yet a simple solution is available. One which will not require the constitution to be amended again, nor require any agonizing over any manner of complex formulae. This simple solution is for the court to back off its 1982 decision in *In re Apportionment Law*,<sup>141</sup> if for no other reason than clinging to it now would make of it, in a word coined by Henry VIII, a man who knew just a bit about the creative limitation of terms—a mumpsimus.<sup>142</sup>

Were the court to “dumpsimus” those parts of *In re Apportionment Law*<sup>143</sup> relating to holdover senators, truncated terms, and mandatory post-apportionment elections, the Gordian Knot would be hacked through, the situation resolved, and the Gerrymander restricted to more familiar haunts. Granted, certain senators would “hold over”<sup>144</sup> for two years in

language, and as it was this language the justices emphasized in ordering truncation of Senate terms following apportionment, it is this language which renders the Florida term limit situation unique. No court in any other state in which term limits have been imposed and challenged has had to deal with this situation. Nor is any likely to be called upon to do so. It is a Florida question only.

141. 414 So. 2d at 1040.

142. This is a marvelously colorful and descriptive word which is unfortunately much under used. Its etymology is as follows:

For example, the word “mumpsimus,” meaning “an erroneous doctrinal view obstinately adhered to,” was first put into currency by Henry VIII, in a speech from the throne in 1545. He remarked, “Some be too stiff in their old mumpsimus, others be too busy and curious in their sumpsimus.” He was referring to the . . . story of a priest who, on being reprovved for reading in the mass “Quod in ore mumpsimus” instead of “Quod in ore sumpsimus” (“which we have taken in our mouths”), his missal (catholic mass book) being miscopied, replied . . . he had read it [that way] for forty years, “and I will not change my old mumpsimus for your new sumpsimus.” The word has held its own since, though the doctrinal sense has lost its importance compared with the scholastic sense: It now means “an established manuscript-reading which, though obviously incorrect, is retained blindly by old-fashioned scholars.”

ROBERT GRAVES & ALAN HODGE, *THE READER OVER YOUR SHOULDER* 17-18 (1961).

143. 414 So. 2d at 1040.

144. *Id.* at 1045-50.



districts that, after apportionment, they may not have been, in the purest sense, "elected from."<sup>145</sup> However, one is here vexed by the task of balancing which kind of "holdover"<sup>146</sup> is worse—one prohibited by judges on the basis of wordplay, or one declared out of order by millions of voters? Small "r" republicanism says to take the voters. A review of the applicable case law on the "holdover" question also says to take the voters. This body of jurisprudence is, in the words of former Chief Justice Sundberg, "essentially unanimous" in saying there is nothing particularly evil in them.<sup>147</sup> Besides, the court could easily justify such a decision not as a reversal, but as a response to changed conditions. Further, were this route taken, the mechanics of implementation could be perfected were the court to rule that the term limit language takes effect with the seating of the successors to those persons elected in 1992. This would allow the elimination of the two-year "tail" which now appends itself to the asymmetric arithmetic regarding the even seat senators elected in 1992—a "tail" which makes them the first class of "Natural 10's."

There is, of course, another judicial alternative, but it is not pretty as it would mock the constitutionally mandated length of Senate terms. This solution is "double truncation," wherein those terms which would extend beyond the eight-year limit would be "truncated" at eight. If this were to be considered, it would probably be better to wholly abandon the concept of staggered four-year terms for senators and go, via amendment, to a straight two-year term scheme identical to the Florida House.

## V. CONCLUSION

As there is nothing much useful or new left to say, convention declares that at this point some sort of conclusion should be offered. The substantive material has been laid out in what the author hopes is an adequate way and it is now his job to concoct some manner of summing up. In the best of all possible cases, this exercise will result in something profound and compellingly prescriptive. In the more realistic case, it usually takes the form of a more dignified way to end than simply quitting. In that light then, let it be said the foregoing presents two problems with Florida's term-limit amendment as adopted. One of these, the question of timing, is a nice, but little, question of line-drawing which will resolve itself even if nothing

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145. *Id.*

146. *Id.*

147. *Id.* at 1056 (Sundberg, J., concurring in part and dissenting in part).

happens. There may be a bump or two along the road to resolving the initial confusion, but within a decade, it will be forgotten like the great concern over the timing of the imposition of the Sunshine Amendment restrictions fifteen years ago.

The same, ultimately happy, fate cannot be said to be on its way with regard to the second problem. It will not, and cannot, be cured through any sort of neglect. It must be addressed; and it is to be hoped it will be addressed, ideally before it becomes a critical problem, rather than one of intellectual projection.

Why it was that the second problem crept in unnoticed will probably never be known. Indeed, there probably is no real reason at all. Yet it is there and its presence suggests a type of failure. The drafting of constitutional provisions may have one foot firmly planted on the solid ground of technical skill, but the other rests upon the somewhat more plastic surface of art. Done well, the resulting product is the highest and most sublime of all legal endeavors. Done less than well, the result is at best harmlessly cumbersome and at worst unworkable.

If the product be the former, a unity of art and technical skill, wisdom teaches the folly of attempting further improvement. "If it ain't broke don't fix it," the saying goes.

Not so in the case contrariwise.

Not so here.

It's broke.



FIGURE # 2

. EVEN SEATS.  
NO NUMERICAL CHANGES.  
ALL OCCUPANTS SERVE MAXIMUM TIME ALLOWED.

IN DECADE II (1992-2002)					OUT DECADE II (2002-2012)					IN DECADE III (2012-2022)					OUT DECADE III (2022-2032)					IN DECADE IV (2032-2042)				
Year					Year					Year					Year					Year				
1	1	1	1	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
9	9	9	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9	9	9	9	0	0	0	0	0	1	1	1	1	1	2	2	2	2	3	3	3	3	3	4	4
2	4	6	8	0	2	4	6	8	0	2	4	6	8	0	2	4	6	8	0	2	4	6	8	0
Y—Y—Y—Y—Y					Y—Y—Y—Y—Y					Y—Y—Y—Y—Y					Y—Y—Y—Y—Y					Y—Y—Y—Y—Y				
(2-4-4)					(4-4-2)					(2-4-4)					(4-4-2)					(2-4-4)				
r>>(10 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω				
ay—r—r—r—r—r					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω				
r>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω				
ay—r—r—r—r—r					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω				
r>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω				
ay—r—r—r—r—r					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω					a>>(8 yrs)<<Ω				

X = Regularly Scheduled Elections for Odd Numbered Seats (1992-2042).

(?-?-?) = Term Pattern for Discreet Apportionment Decade.

ay (alpha-y) = Year of Initial Election to Even Seat.

| = Year of Mandatory Transition from Old Member to New Member.

Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.

r = Re-election to Seat.

>> ( ? yrs) << = Total Permissible Length of Tenure Under Term Limit Provision.

GRAND MANIPULATION 1 (1992 ODD SEAT START).  
ODD TO EVEN, EVEN TO ODD, ETC. EACH DECENNIUM.  
ALL OCCUPANTS SERVE MAXIMUM TIME ALLOWED.

X = Regularly Scheduled Elections for Odd Numbered Seats (1992-2042).  
Y = Regularly Scheduled Elections for Even Numbered Seats (1992-2042).  
(?-?-?) = Term Pattern for Discreet Apportionment Decade.  
ax (alpha-x) = Year of Initial Election to Odd Seat.  
ay (alpha-y) = Year of Initial Election to Even Seat.  
| = Year of Mandatory Transition from Old Member to New Member.  
Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.  
r = Re-election to Seat.  
[rx] or [[x] = Seat Number Changes to Odd with this Election or Re-election.  
[ry] or [[y] = Seat Number Changes to Even with this Election or Re-election.  
» ( ? yrs) « = Total Permissible Length of Tenure Under Term Limit Provision.

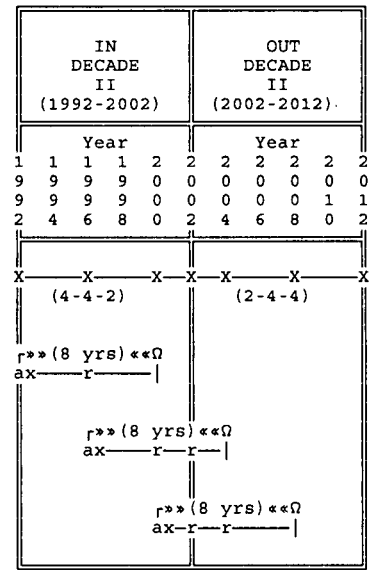
GRAND MANIPULATION 2 (1992 EVEN SEAT START).  
EVEN TO ODD, ODD TO EVEN, ETC. EACH DECENNIUM.  
ALL OCCUPANTS SERVE MAXIMUM TIME ALLOWED.

[illegible]

» ( ? yrs) « = Total Permissible Length of Tenure Under Term Limit Provision.

FIGURE # 5

ODD SEATS.  
NO NUMERICAL CHANGES.  
IN YEAR START.



X = Regularly Scheduled Elections for Odd Numbered Seats (1992-2012).  
(?-?-?) = Term Pattern for Discreet Apportionment Decade.  
ax (alpha-x ) = Year of Initial Election to Odd Seat.  
| = Year of Mandatory Transition from Old Member to New Member.  
Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.  
r = Re-election to Seat.  
\*\* ( ? yrs) \*\* = Total Permissible Length of Tenure Under Term Limit Provision.

FIGURE # 6

ODD SEATS.  
NO NUMERICAL CHANGES.  
OUT YEAR START.

OUT DECADE II (2002-2012)					IN DECADE III (2012-2022)				
Year					Year				
2	2	2	2	2	2	2	2	2	2
0	0	0	0	0	0	0	0	0	0
0	0	0	0	1	1	1	1	1	2
2	4	6	8	0	2	4	6	8	0
X—X—X—X—X					X—X—X—X—X				
(2-4-4)					(4-4-2)				
r** (10 yrs) **Ω					{NATURAL 10}				
ax—r—r—r—r—r									
r** (8 yrs) **Ω									
ax—r—r—r—r—r									
r** (8 yrs) **Ω									
ax—r—r—r—r—r									

X = Regularly Scheduled Elections for Odd Numbered Seats (2002-2022).

(?-?-?) = Term Pattern for Discreet Apportionment Decade.

ax (alpha-x ) = Year of Initial Election to Odd Seat.

| = Year of Mandatory Transition from Old Member to New Member.

Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision

r = Re-election to Seat.

\*\* ( ? yrs) \*\* = Total Permissible Length of Tenure Under Term Limit Provision.



FIGURE # 7

EVEN SEATS.  
NO NUMERICAL CHANGES.  
IN YEAR START.

IN DECADE II (1992-2002)						OUT DECADE II (2002-2012)					
Year						Year					
1	1	1	1	2	2	2	2	2	2	2	2
9	9	9	9	0	0	0	0	0	0	0	0
9	9	9	9	0	0	0	0	0	1	1	1
2	4	6	8	0	2	4	6	8	0	2	2
Y—Y—Y—Y—Y—Y (4-4-2)						Y—Y—Y—Y—Y—Y (2-4-4)					
r** (10 yrs) **Ω						{NATURAL 10}					
ay—r—r—r—r—r—r											
r** (8 yrs) **Ω											
ay—r—r—r—r—r—r											
r** (8 yrs) **Ω											
ay—r—r—r—r—r—r											

Y = Regularly Scheduled Elections for Even Numbered Seats (1992-2012).

(?—?—?) = Term Pattern for Discreet Apportionment Decade.

ay (alpha-y ) = Year of Initial Election to Even Seat.

| = Year of Mandatory Transition from Old Member to New Member.

Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.

r = Re-election to Seat.

\*\* ( ? yrs) \*\* = Total Permissible Length of Tenure Under Term Limit Provision.

## FIGURE # 8

EVEN SEATS.  
NO NUMERICAL CHANGES.  
OUT YEAR START.

OUT DECADE II (2002-2012)					IN DECADE III (2012-2022)				
Year					Year				
2	2	2	2	2	2	2	2	2	2
0	0	0	0	0	0	0	0	0	0
0	0	0	0	1	1	1	1	1	2
2	4	6	8	0	2	4	6	8	0
Y—Y—Y—Y—Y					Y—Y—Y—Y—Y				
(4-4-2)					(2-4-4)				
r** (8 yrs) **Ω									
ay—r—									
r** (8 yrs) **Ω									
ay—r—r—									
r** (8 yrs) **Ω									
ay—r—r—									

Y = Regularly Scheduled Elections for Even Numbered Seats (1992-2022).

(?-?-?) = Term Pattern for Discreet Apportionment Decade.

ay (alpha-y ) = Year of Initial Election to Even Seat.

| = Year of Mandatory Transition from Old Member to New Member.

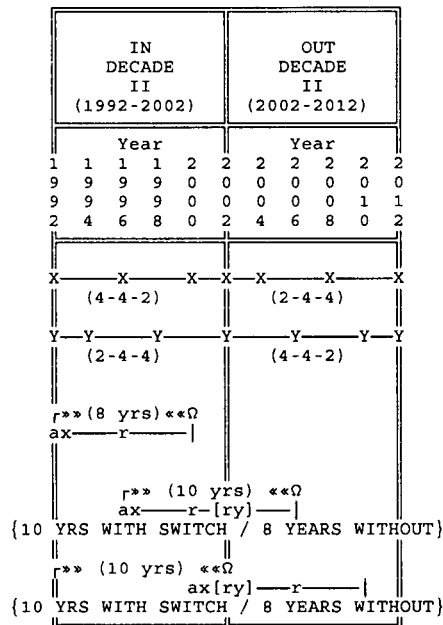
Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.

r = Re-election to Seat.

\*\* ( ? yrs) \*\* = Total Permissible Length of Tenure Under Term Limit Provision.

FIGURE # 9

PETIT MANIPULATION 1.  
 ODD TO EVEN.  
 IN YEAR START.



X = Regularly Scheduled Elections for Odd Numbered Seats (1992-2012).

Y = Regularly Scheduled Elections for Even Numbered Seats (1992-2012).

(?-?-?) = Term Pattern for Discreet Apportionment Decade.

ax (alpha-x) = Year of Initial Election to Odd Seat.

ay (alpha-y) = Year of Initial Election to Even Seat.

| = Year of Mandatory Transition from Old Member to New Member.

Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.

r = Re-election to Seat.

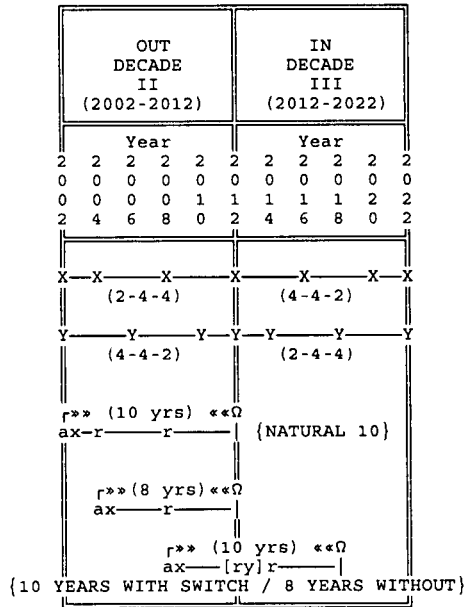
[rx] or [|x] = Seat Number Changes to Odd with this Election or Re-election.

[ry] or [|y] = Seat Number Changes to Even with this Election or Re-election.

\*\* ( ? yrs) \*\* = Total Permissible Length of Tenure Under Term Limit Provision.

FIGURE # 10

PETIT MANIPULATION 2.  
 ODD TO EVEN.  
 OUT YEAR START.



X = Regularly Scheduled Elections for Odd Numbered Seats (1992-2022).

Y = Regularly Scheduled Elections for Even Numbered Seats (1992-2022).

(?-?-?) = Term Pattern for Discreet Apportionment Decade.

ax (alpha-x) = Year of Initial Election to Odd Seat.

ay (alpha-y) = Year of Initial Election to Even Seat.

| = Year of Mandatory Transition from Old Member to New Member.

Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.

r = Re-election to Seat.

[rx] or [|x] = Seat Number Changes to Odd with this Election or Re-election.

[ry] or [|y] = Seat Number Changes to Even with this Election or Re-election.

\*\* ( ? yrs) \*\* = Total Permissible Length of Tenure Under Term Limit Provision.

FIGURE # 11

PETIT MANIPULATION 3.  
EVEN TO ODD.  
IN YEAR START.

IN DECADE II (1992-2002)					OUT DECADE II (2002-2012)				
Year					Year				
1	1	1	1	2	2	2	2	2	2
9	9	9	9	0	0	0	0	0	0
9	9	9	9	0	0	0	0	0	1
2	4	6	8	0	2	4	6	8	0
X—X—X—X—X					X—X—X—X—X				
(4-4-2)					(2-4-4)				
Y—Y—Y—Y—Y					Y—Y—Y—Y—Y				
(2-4-4)					(4-4-2)				
r»» (10 yrs) ««Ω					{NATURAL 10}				
ay—r—r—r—r—r									
r»» (8 yrs) ««Ω									
ay—r—r—r—r—r									
r»» (10 yrs) ««Ω									
ay—[rx]r—r—r—r—r									
{10 YEARS WITH SWITCH / 8 YEARS WITHOUT}									

X = Regularly Scheduled Elections for Odd Numbered Seats (1992-2012).

Y = Regularly Scheduled Elections for Even Numbered Seats (1992-2012).

(?-?-?) = Term Pattern for Discreet Apportionment Decade.

ax (alpha-x) = Year of Initial Election to Odd Seat.

ay (alpha-y) = Year of Initial Election to Even Seat.

| = Year of Mandatory Transition from Old Member to New Member.

Ω (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.

r = Re-election to Seat.

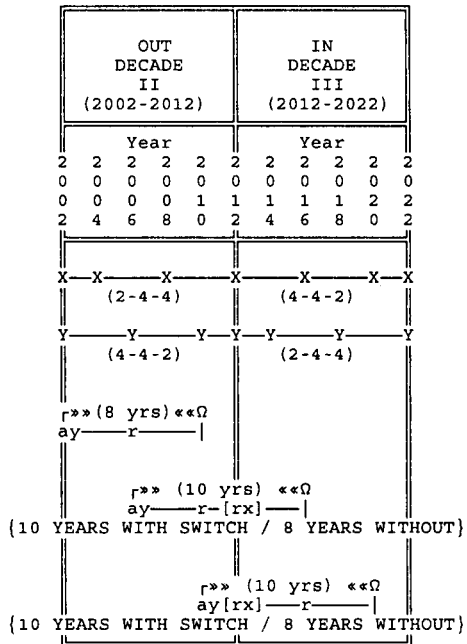
[rx] or [|x] = Seat Number Changes to Odd with this Election or Re-election.

[ry] or [|y] = Seat Number Changes to Even with this Election or Re-election.

»» ( ? yrs) «« = Total Permissible Length of Tenure Under Term Limit Provision.

FIGURE # 12

PETIT MANIPULATION 4.  
EVEN TO ODD.  
OUT YEAR START.



X = Regularly Scheduled Elections for Odd Numbered Seats (1992-2022).

Y = Regularly Scheduled Elections for Even Numbered Seats (1992-2022).

(?-?-?) = Term Pattern for Discreet Apportionment Decade.

ax (alpha-x) = Year of Initial Election to Odd Seat.

ay (alpha-y) = Year of Initial Election to Even Seat.

| = Year of Mandatory Transition from Old Member to New Member.

$\Omega$  (omega) = Mandatory End of Tenure in Seat Under Term Limit Provision.

r = Re-election to Seat.

[rx] or [|x] = Seat Number Changes to Odd with this Election or Re-election.

[ry] or [|y] = Seat Number Changes to Even with this Election or Re-election.

\*\* ( ? yrs) \*\* = Total Permissible Length of Tenure Under Term Limit Provision.

# The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(e)—Let the Sunshine In!

Patricia A. Gleason\*  
Joslyn Wilson\*\*

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\* General Counsel, Office of Florida Attorney General, Department of Legal Affairs; B.A. 1973, Rollins College; J.D., 1976, Florida State University Law School. The author has served in the Attorney General's Office since 1976. Prior to becoming General Counsel in 1989, she served as Director of the Cabinet Division and Chief of the Administrative Law Section. She is co-editor of the Government in the Sunshine Manual.

\*\* Director, Division of Opinions, Office of the Florida Attorney General, Department of Legal Affairs; B.A. 1973, University of Colorado; J.D., 1976, Florida State University Law School. The author has served in the Attorney General's Office since 1977 and as Director of the Opinions Division since 1984. She has been co-editor of the Government in the Sunshine Manual.

## 1. INTRODUCTION

Florida's reputation as the "Sunshine State" was established long ago by laws which provided the public with a right of access to the records and proceedings of governmental agencies. This tradition of an open government began with Florida's enactment of the Public Records Law in 1909,<sup>1</sup> and the Government in the Sunshine Law in 1967.<sup>2</sup> However, as these rights of access were primarily secured by statutory enactments, they were subject to the discretion of the Legislature and faced the continual threat of being weakened or dismantled by future legislatures. Nevertheless, the tradition has been reinforced by the Florida judiciary which, for the most part, has liberally construed the provisions of the open government laws, to give effect to the strong public interest in access to governmental meetings and records.<sup>3</sup>

This commitment to open government has been recently reaffirmed with the adoption of two amendments to the Florida Constitution: article III, section 4(e), in 1990, and article I, section 24, in 1992. These amendments grant constitutional status to the public's right of access to all levels of government. With the adoption of these amendments, the people of Florida have secured for the future their right to an open government.

## II. HISTORY OF THE AMENDMENTS

The Sunshine Law establishes a right of access to meetings of "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision."<sup>4</sup> The Public Records Law provides that records made or received by an "agency" in the course of its official business are available for inspection.<sup>5</sup>

1. Ch. 09-5942, § 1, 1909 Fla. Laws 132 (codified at FLA. STAT. § 119.01 (1991)) [hereinafter the Public Records Law].

2. Ch. 67-356, § 1, 1967 Fla. Laws 1147-48 (codified at FLA. STAT. § 286.011 (1991)) [hereinafter the Sunshine Law].

3. See *Board of Public Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th Dist. Ct. App. 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); see also *Lorei v. Smith*, 464 So. 2d 1330 (Fla. 2d Dist. Ct. App. 1985), *review denied*, 475 So. 2d 695 (Fla. 1985) (suggesting that public policy favoring open records should be given its broadest possible expression); *Blackford v. School Bd.*, 375 So. 2d 578 (Fla. 5th Dist. Ct. App. 1979) (stating that the Sunshine Law should be construed to frustrate all evasive devices).

4. FLA. STAT. § 286.011 (1991).

5. *Id.* § 119.01.



Florida courts have affirmed that the broad reach of these open government laws extends to the executive branch of the state government,<sup>6</sup> counties,<sup>7</sup> municipalities,<sup>8</sup> and special districts.<sup>9</sup>

The independence of the judiciary with regard to court records and proceedings, however, has been recognized in several Florida Supreme Court decisions.<sup>10</sup> In addition, the applicability of the open government statutes to the legislative branch has been disputed. While the Florida Attorney General's Office has considered the open government laws to be applicable to the state Legislature,<sup>11</sup> that view was not universally held.<sup>12</sup>

6. See, e.g., *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983) (stating that the advisory committee of a state university must comply with the Sunshine Law); *Florida Dep't of Law Enforcement v. Ortega*, 508 So. 2d 493, 494 (Fla. 3d Dist. Ct. App. 1987) (holding that department of law enforcement records are subject to release under the Public Records Law). *Turner v. Wainwright*, 379 So. 2d 148, 151-54 (Fla. 1st Dist. Ct. App. 1980), *aff'd and remanded* 389 So. 2d 1181 (Fla. 1980) (stating that the Sunshine Law is applicable to meetings of the Parole and Probation Commission).

7. See, e.g., *Seminole County*, 512 So. 2d at 1003; *Bland v. Jackson County*, 514 So. 2d 1115, 1116 (Fla. 1st Dist. Ct. App. 1984) (stating that the Sunshine Law is meant to protect the public from closed door politics); *Orange County v. Florida Land Co.*, 450 So. 2d 341, 343-44 (Fla. 5th Dist. Ct. App. 1984) (holding that the work product privilege does not take precedence over the disclosure requirement of the Public Records Act), *review denied*, 458 So. 2d 273 (Fla. 1984).

8. See, e.g., *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971) (holding that municipal officials violate the Sunshine Law when they meet at a time or place designed to avoid the public); *City of Delray Beach v. Barfield*, 579 So. 2d 315, 318 (Fla. 4th Dist. Ct. App. 1991) (stating that the primary intent of the Public Records Law, with respect to complaints against police officers, is openness and availability of public records); *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d Dist. Ct. App. 1979) (holding that when a city manager appoints an advisory board to make recommendations, it is subject to the dictates of the Sunshine Law).

9. See, e.g., *Doran*, 224 So. 2d at 700 (holding that the Sunshine Law requires that meetings of public boards must be made public); *Hillsborough County Aviation Auth. v. Azzarelli Constr. Co.*, 436 So. 2d 153, 154 (Fla. 2d Dist. Ct. App. 1983) (holding that a county aviation authority's work product cannot be withheld from production under the Public Records Law); *Cape Coral Medical Ctr. v. News-Press Publishing Co.*, 390 So. 2d 1216, 1218 (Fla. 2d Dist. Ct. App. 1980) (holding that a public hospital must make its records available under the Public Records Law).

10. See *In re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes*, 398 So. 2d 446, 447 (Fla. 1981); *Johnson v. State*, 336 So. 2d 93 (Fla. 1976). The authority of the judiciary over access to court records flows from the separation of powers doctrine and from the Supreme Court's ability to adopt rules for practice and procedure in all courts pursuant to article V, section 2(a) of the Florida Constitution. *Id.* at 95.

11. See 1977 FLA. ATT'Y GEN. ANN. REP. 10 (stating that the Government in the Sunshine Law applies to the Legislature and Public Records Act extends to all "state officers," including members of the Legislature); 1972 FLA. ATT'Y GEN. ANN. REP. 16

Two circuit courts have held that the law was inapplicable to the Legislature.<sup>13</sup> Thus, the full scope of the public's right of access to all branches of government was unclear.

In the late 1980's, increased public awareness, coupled with a growing dissatisfaction that key legislative decisions were being made by the legislative leadership behind closed doors, gave rise to renewed efforts to amend Florida's Constitution to subject the Legislature to an open meetings requirement.<sup>14</sup> Of the thirteen constitutional amendments proposed on this issue in the twenty-two regular sessions between the enactment of the

(Legislature and its committees are subject to the Sunshine Law, and two or more members of the Legislature may not hold a secret meeting with the intention of excluding the public and the press, for the purpose of discussing their official actions respecting proposed or pending legislation without violating the Sunshine Law).

12. See Memorandum from Steven Kahn, Att'y for Fla. S. Rules and Calen. Comm., (May 19, 1976). Mr. Kahn stated that the Senate did not fall within the plain meaning of, and thus was not subject to, the Sunshine Law. *Id.* Memorandum from Staff, Fla. H. Gov. Op. Comm. (April 14, 1975). The staff noted two possible constitutional impediments to applying the Sunshine Law to the Legislature: Article III, section 4(a) of the Florida Constitution, authorizing the Legislature to determine its own rules, and article III, section 4(b) of the Florida Constitution, requiring that the sessions of each house be open. *Id.*

13. See *City of Safety Harbor v. City of Clearwater*, No. 40,269 (Fla. 6th Cir. Ct. May 14, 1974) (inasmuch as the Sunshine Law imposes criminal sanctions for violations of its terms, it should be strictly construed; therefore, as the statute does not clearly include the Legislature, the Legislature is not subject to its terms); *Miami Herald Publishing Co. v. Moffitt*, 6 Fla. Supp. 2d 13 (2d Cir. Ct. 1983). Although the *Moffitt* case went to the Florida Supreme Court, that court did not directly address the applicability of the open government laws to the Legislature. See *Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984), in which court concluded that the only issue before it was the propriety and constitutionality of certain internal activities of members of the Legislature. The court stated, "[i]t is a legislative prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative." *Id.* at 1022. The rules of procedure of both houses required then, as they do now, that committee meetings be open to the public. Compare Fla. S. Rule 2.13 (1988-1990) with Fla. S. Rule 2.13 (1992-1994); and Fla. H.R. Rule 6.25 (1989) with Fla. H.R. Rule 6.25 (1992-1994). See also FLA. CONST. art III, § 4(b) (requiring the sessions of the House of Representatives and of the Senate to be open to the public except for Senate sessions relating to the appointment to or removal from public office).

14. For a detailed analysis of the history surrounding the adoption of the open legislative meetings amendment, see Thomas R. McSwain, *The Sun Rises on the Florida Legislature: The Constitutional Amendment on Open Legislative Meetings*, 19 FLA. ST. U. L. REV. 307 (1991). McSwain attributes much of the impetus for a more open Legislature to the aftermath of the now-defunct services tax in which key legislators and gubernatorial aides met secretly at a pizza and beer party in a lobbyist's townhouse to work out the details of the tax. *Id.* at 307.

Sunshine Law in 1967 and the passage of article III, section 4(e) of the Florida Constitution in 1990, twelve were filed during the 1988-1990 legislative sessions.<sup>15</sup>

In 1990, Senate Joint Resolution 1990 & 1992 passed in both houses of the Florida Legislature.<sup>16</sup> It was placed on the ballot for the November 1990 general election where it was overwhelmingly approved by the voters.<sup>17</sup> The amendment, however, dealt only with legislative meetings. Still in dispute was the applicability of the Public Records Law to legislative records and the public's right of access to the judicial branch of government.

On November 7, 1991, the Florida Supreme Court's decision in *Locke v. Hawkes*<sup>18</sup> forced a reexamination of this issue. The question before the court concerned the application of the public records law to the expenditure records of a state representative's district office.<sup>19</sup> However, the opinion focused on far more than the simple question of whether the Public Records Law applied to the financial records sought in the case at bar.<sup>20</sup>

After reviewing prior decisions which focused on the application of the Public Records Law and its possible interference with the separation of powers provision in the state constitution,<sup>21</sup> the Florida Supreme Court ruled that the Public Records Law was inapplicable to the Governor, members of the cabinet, judicial officers and members of the Legislature.<sup>22</sup> The court, however, did not expressly limit its holding to these officers; rather, it stated, somewhat ambiguously, that the Public Records Law did not apply to the "constitutional officers of the three branches of government

15. *Id.* at 328 n.155. In addition, efforts were undertaken by the Florida Sunshine Committee and Common Cause of Florida to amend the Florida Constitution by initiative petition pursuant to article XI, section 3 of the Florida Constitution. *Id.* at 336-37.

16. FLA. S. JOUR. 1397-1398 (Reg. Sess. 1990) (indicating passage of the joint resolution in the Senate was 36 yeas to 0 nays); FLA. H.R. JOUR. 1817 (Reg. Sess. 1990) (indicating passage of the joint resolution in the House of Representative was 109 yeas to 3 nays).

17. The amendment was approved 2,795,784 to 392,323. McSwain, *supra* note 14, at 365 n.448 (citing November 6, 1990 General Election Results, Florida Department of State, Division of Elections, at 5).

18. 1991 WL 231589 (Fla. Nov. 7, 1991), *vacated and superseded by* 595 So. 2d 32 (Fla. 1992).

19. *Id.*

20. *Id.*

21. FLA. CONST. art. II, § 3. This section states that "[t]he power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id.*

22. *Locke*, 1991 WL 231589 at \*1.

or to their functions."<sup>23</sup>

The apparent grounding of the *Locke* decision on separation of powers principles, when coupled with the Florida Supreme Court's distinction between constitutional and statutory functions, insofar as the open government laws are concerned, generated a number of questions regarding the application of these laws to a variety of agencies. The Attorney General's Office reported receiving telephone inquiries from property appraisers, tax collectors and other officers.<sup>24</sup> Additionally, claims were made that school districts and the state attorney's offices were now exempt from statutory disclosure requirements.<sup>25</sup> Eventually, most of these contentions were retracted and the agencies agreed to abide by the open government laws. However, the uncertainty stemming from the *Locke* decision prompted the Attorney General and other parties to the decision to ask the court to clarify its ruling.

Although the court subsequently agreed to rehear the case,<sup>26</sup> in light of the court's reliance on separation of powers principles in its analysis of the application of the open government statutes, it was clear that the only effective means to assure access to all three branches of government was to secure this right in the Florida Constitution. Accordingly, on November 13, 1991, Attorney General Butterworth proposed the adoption of a new "Open Government Constitutional Amendment" to be added to the Declaration of Rights of the Florida Constitution.<sup>27</sup>

Following weeks of debate and consideration of various proposals,<sup>28</sup>

23. *Id.*

24. Louis Lavelle, *Attorney Wants Records Law Clarified*, TAMPA TRIB., Nov. 9, 1991, at A1.

25. *Public Should React Strongly to Closing of Public Records*, FLORIDA TIMES-UNION, Nov. 29, 1991, at A10 (school board attorney advises that due to *Locke*, The Public Records Law no longer applies to school boards and personnel records should be closed to avoid liability); Stephanie Tripp, *A Cloud Over Sunshine Law*, TAMPA TRIB., Nov. 10, 1991, at A8. The author stated, "[o]n Friday, the State Attorney's Office in Hillsborough County, citing [*Locke*], initially refused to show a reporter the file of a closed investigation. Prosecutors handed over the file only after talking with an attorney for The Tampa Tribune." *Id.*

26. *Locke v. Hawkes*, 595 So. 2d 32, 33 (Fla. 1992).

27. The Attorney General stated that the Florida Supreme Court's decision in *Locke* "casts a tremendous shadow on the Sunshine in Florida Government . . . This constitutional amendment will get rid of the shadow." Mark Silva, *Attorney General Urges 'Sunshine' Amendment*, MIAMI HERALD, Nov. 13, 1991, at A1.

28. Speaker of the House, T.K. Wetherell, and Senate President Gwen Margolis initially claimed that they would support the amendment but wanted to see "the fine print." Associated Press, *Florida Seeking Amendment for Open Records*, FLORIDA TIMES UNION, Nov. 13, 1991, at B1. However, several different proposals were ultimately proposed and

the Legislature eventually enacted a joint resolution proposing a constitutional amendment entitled "Access to public records and meetings."<sup>29</sup> Shortly after this legislative action, the Florida Supreme Court, on February 27, 1992, withdrew its earlier decision in *Locke*, and in a substituted opinion, made it clear that the open government laws applied to the executive branch and to local governmental entities.<sup>30</sup> However, the final *Locke* ruling reaffirmed the court's previous conclusion that the Public Records Law did not apply to the courts or to the Legislature.<sup>31</sup> Thus, the question of access to all three branches of government remained at issue and could be resolved only through passage of a constitutional amendment.

The proposed open government constitutional amendment was placed on the November 3, 1992, general election ballot and was overwhelmingly approved by the voters.<sup>32</sup> The amendment took effect July 1, 1993. Prior to the effective date, both the judicial and legislative branches took steps to enact exemptions to the open government laws that would be "grandfathered in" prior to the amendment.

### III. ANALYSIS OF THE CONSTITUTIONAL AMENDMENTS

#### A. *Legislative Open Meetings Amendment*

Article III, section 4(a) of the Florida Constitution authorizes each house of the Legislature to adopt its own rules of procedure.<sup>33</sup> The legislative open meetings amendment, which creates article III, section 4(e), requires these rules of procedure to provide for public access to certain legislative meetings.<sup>34</sup>

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debated during the 1992 legislative session. See *infra* note 29.

29. FLA. H.R. JOUR. 1727, 863, 2035 (Reg. Sess. 1992). The bill was passed by the Legislature on February 25, 1992, signed by the appropriate constitutional officers and filed with the Secretary of State on March 2, 1992. FLA. H.R. JOUR. 545, 547 (Reg. Sess. 1992). For a comprehensive discussion and analysis of the steps leading to the passage of the resolution see generally, Kara. M. Tollett, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 FLA. ST. U. L. REV. 525 (1992) [hereinafter Tollett].

30. *Locke*, 595 So. 2d at 36-37.

31. *Id.* at 32.

32. Tollett, *supra* note 29, at 525 (citing November 3, 1992 General Election Results, Florida Department of State, Division of Elections (unofficial)) (The amendment won 83.1%).

33. FLA. CONST. art. II, § 4(a).

34. FLA. S. JOUR. S1990 (1990) (proposed FLA. CONST. art III, §§ (4)(c), (4)(e)). As amended, article III, section 4 of the Florida Constitution provides in part:

Article III, section 4(e) requires that the rules provide for all legislative committee and subcommittee meetings of each house and joint conference committee meetings to be open and noticed.<sup>35</sup> While such a requirement is now a constitutional mandate, it did not significantly impact on existing House and Senate rules which already required legislative committee and conference committee meetings to be open and noticed.<sup>36</sup>

Of perhaps greater significance is the requirement in article III, section 4(e) that all prearranged meetings between *three or more* legislators, or between the Governor, the Senate, President or the Speaker of the House of Representatives, for the purpose of agreeing upon formal legislative action, which is or will be taken on pending legislation, or amendments, must be reasonably open to the public.<sup>37</sup> However, section 4(e) also recognizes that where it is reasonably necessary for security purposes, or to protect a

Section 4. Quorum and Procedure.—

(c) Each house shall keep and publish a journal of its proceedings; and upon the request of five members present, the vote of each member voting on any question shall be entered on the journal. In any legislative committee or subcommittee, the vote of each member voting on the final passage of any legislation pending before the committee, and upon the request of any two members of the committee or subcommittee, the vote of each member on any other question, shall be recorded.

(e) The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house, and joint conference committee meetings, shall be open and noticed to the public. The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public. All open meetings shall be subject to order and decorum. This section shall be implemented and defined by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to protect a witness appearing before a committee, provide for the closure of committee meetings. Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

FLA. CONST. art III, § 4.

35. *Id.* § 4(e).

36. *See* FLA. S. RULE 2.13 (1988-1990); FLA. H.R. RULE 6.25 (1989); FLA. S. RULE 2.19 (1989); FLA. H.R. RULE 6.57 (1989); *see also* FLA. S. RULES 2.6, 2.8-2.10 (1988-1990); FLA. H.R. RULES 6.14, 6.17-6.20 (1989) (relating to notice).

37. FLA. CONST. art. III, § 4(c).

witness appearing before a committee, the rules may provide for closure of committee meetings. All open meetings are subject to order and decorum.<sup>38</sup>

Senate Joint Resolution 1990 also amended the existing provisions of article III, section 4(c). Article III, section 4(c) required, among other things, that the vote of each member voting on a question be entered into the House or Senate's journal, upon the request of five members present.<sup>39</sup> The open legislative meetings amendment expands this requirement. Article III, section 4(c) now also requires that in any legislative committee or subcommittee, the votes of the members during the final passage of legislation pending before a committee, or on any other question when requested by two members of a committee or subcommittee, be recorded.<sup>40</sup>

The amendment, while requiring a new openness in proceedings of the Legislature, is not as broad as the Sunshine Law. While the Sunshine Law has been interpreted to apply to two or more members of a public collegial body,<sup>41</sup> article III, section 4(e) refers to meetings of "more than two," or in other words, at least three members.<sup>42</sup> In addition, the Sunshine Law has been held to encompass all deliberations and discussions of public board members on a matter which foreseeably will come before that board.<sup>43</sup> Conversely, the constitutional amendment limits its application to committee or subcommittee meetings and to prearranged meetings between three or more legislators for the purpose of agreeing upon formal legislative action which is or will be taken on *pending* legislation or amendments.<sup>44</sup>

The constitutional amendment also specifically protects the authority of the Legislature to interpret and implement its own rules.<sup>45</sup> Seeking to foreclose judicial interpretations which might expand its interpretation, article III, section 4(e) states:

This section shall be implemented and defined by the rules of each

38. *Id.*

39. *Id.*

40. *Id.*

41. *See, e.g.,* Hough v. Stembridge, 278 So. 2d 288, 289 (Fla. 3d Dist. Ct. App. 1973).

42. FLA. CONST. art III, § 4(e).

43. *Id.* *See also* Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Wolfson v. State, 344 So. 2d 611 (Fla. 2d Dist. Ct. App. 1977); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969) ("it is the entire decision-making process that the legislature intended to affect by the enactment of [section 286.011 of the Florida Statutes]").

44. FLA. CONST. art. III, § 4(e).

45. *Id.*

house . . . . Each house shall be the *sole* judge for the interpretation, implementation, and enforcement of this section.<sup>46</sup>

### B. *Open Government Constitutional Amendment*

Article I, section 24 of the Florida Constitution provides that “every person” has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except as otherwise authorized by section 24, or as provided elsewhere in the constitution.<sup>47</sup>

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46. *Id.* (emphasis added).

47. *Id.* art. I, § 24. The full text of article I, section 24 of the Florida Constitution provides:

Section 24. Access to public records and meetings.—

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in article III, section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

(c) This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

(d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are



This language incorporates key terms contained in the statutory definition of "public record" found in section 119.011(1) of the Florida Statutes.<sup>48</sup> The scope of the constitutional guarantee of access to public records extends to all three branches of government; Executive, Legislative, and Judicial, as well as to state and local agencies and agencies created under the Florida Constitution.<sup>49</sup>

The right of access to meetings of public agencies extends to collegial bodies in the executive branch of state government as well as to those of local governmental entities and special districts. Legislative proceedings are controlled by the terms of article III, section (4)(e) of the Florida Constitution, containing express provisions governing legislative meetings. Meetings within the judicial branch are not encompassed by the amendment.<sup>50</sup>

The Legislature is authorized to enact general laws providing for exemptions from the access requirements. However, any law creating an exemption must expressly state the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the law.<sup>51</sup>

Additionally, the Legislature is required to adopt laws governing enforcement, maintenance, control of destruction, disposal and disposition of records made public by this section. However, each house of the Legislature has the authority to adopt rules governing enforcement regarding records of the legislative branch. Any law creating an exemption of governing enforcement must relate to one subject and shall contain only exemptions and provisions relating to enforcement.<sup>52</sup>

All laws in effect on July 1, 1993 that limit public access to records or meetings "shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed."<sup>53</sup> Thus, existing exemptions are "grandfathered in" and need not be reenacted. Additionally, the Legislature was provided with an entire legislative session between the

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in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

*Id.*

48. The term "public records" is defined to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." FLA. STAT. § 119.011(1) (1991).

49. FLA. CONST. art. I, § 24(a).

50. *Id.* § 24(b).

51. *Id.* § 24(c).

52. *Id.*

53. *Id.* § 24(d).

passage of the amendment in November 1992 and the July 1, 1993 effective date to enact new exemptions without complying with the new constitutional requirements. Court rules in effect on the date of adoption of the amendment that limit access to records remain in effect until repealed.<sup>54</sup>

#### IV. AFTER THE AMENDMENTS

##### A. *Open Legislative Meetings Amendment—Reactions by the Legislature*

###### 1. The House of Representatives Response

The House quickly moved to meet the constitutional amendment's mandate by adopting several rules during its 1990 organizational meeting. Under the new rules, each member of the House is required to provide the public with reasonable access to any prearranged meeting between the representative and two or more other legislators for the purposes of agreeing upon formal legislative action on pending legislation or amendments. However, admission to the meeting is conditioned upon request by members of the public.<sup>55</sup> The rules, therefore, do not automatically open such meetings but require the meetings to be open if a member of the public seeks admission.

Such meetings may not be conducted in the members' lounge, any location which is closed to the public, or which the representative knows to prohibit admission on the basis of race, religion, gender, national origin, physical handicap, or similar classification.<sup>56</sup> The rule specifies, however, that meetings conducted in either chamber while that body is in session are considered to be held at a location which is reasonably accessible and open to the public. Where the number of persons that may attend is limited because of space considerations or in order to maintain order or decorum, at least one representative of the print media, radio, and television must be

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54. FLA. CONST. art. I, § 24(d).

55. FLA. H.R. RULE 5.25 (1993). The rule provides, as the constitutional amendment does, that such meetings are subject to order and decorum. *Id.*

56. *Id.* Compare FLA. STAT. § 286.011(6) (1991) (stating that all persons subject to the open meetings requirement set forth in subsection (1) are prohibited from holding meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict access to such a facility).

included if they request admission.<sup>57</sup>

Similar requirements are imposed for prearranged meetings between the Speaker of the House of Representatives, and either the Governor or the Senate President, for the purpose of agreeing upon formal legislative action to be taken on pending legislation or amendments at the meeting or at a subsequent time.<sup>58</sup> The Speaker is required to provide reasonable access to members of the public at such meetings, subject to order and decorum. At least one representative, who requests admission, of the print media and the radio and television news media must be included.<sup>59</sup>

"Pending legislation" is defined by rule to mean legislation filed with the clerk of the House of Representatives. On the other hand, an amendment is considered pending if it has been delivered to the secretary of a committee in which the legislation is pending or to the clerk of the House if the amendment is to a bill that has been reported favorably by each committee of reference.<sup>60</sup> "Formal legislative action" includes any vote of the House or Senate or of a committee or subcommittee, on final passage or on a motion, other than a motion to adjourn or recess.<sup>61</sup>

The rules continue to provide, as they did prior to the adoption of the constitutional amendment, that committee meetings and conference committee meetings are open.<sup>62</sup> Committee meetings remain subject to the presiding officer's authority to maintain order and decorum. However, where necessary for the witness' protection, the meeting may be closed by the committee chairman with the concurrence of the Speaker.<sup>63</sup>

## 2. The Senate Response

The Senate also sought to implement the new constitutional mandate by the adoption of a new rule. Like its counterpart in the House,<sup>64</sup> Senate Rule 1.441 requires that all legislative committee, subcommittee, and joint

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57. FLA. H.R. RULE 5.25 (1993).

58. *Id.* RULE 2.7. This rule also provides that "[s]uch meetings shall be reasonably open to the public and shall be governed by, and conducted in accordance with, the requirements of Rule 5.25, as if such meeting were a meeting between three or more legislators." *Id.*

59. *Id.*

60. *Id.*

61. FLA. H.R. RULE 5.25 (1993).

62. *Id.* Rule 6.25, 6.57.

63. *Id.* RULE 6.25.

64. *Id.* RULE 5.25.

conference committee meetings be open and noticed to the public.<sup>65</sup> In addition, the rule reiterates the constitutional amendment's requirement of open meetings between "more than two" legislators or between the Governor, the Senate President or Speaker of the House, when such meetings are prearranged for the purpose of agreeing upon formal legislative action on pending legislation or amendments.<sup>66</sup>

In the event of a conflict with another rule, Senate Rule 1.441 states that the rule allowing greater access will prevail. This provision is significant when considering other Senate rules which, although adopted before the constitutional amendment, continue to be effective. For example, the language of Senate Rule 1.43, adopted in 1989,<sup>67</sup> is more aligned to the language the courts used in interpreting section 286.011 of the Florida Statutes, than it is to the constitutional amendment. The rule requires that all meetings at which "legislative business" is discussed between *two or more* senators be open to the public.<sup>68</sup> The term "legislative business" is defined by the rule as "issues pending before, or upon which foreseeable action is reasonably expected to be taken by the Senate, a Senate Committee or Senate Subcommittee."<sup>69</sup>

The rule recognizes a limited exception for meetings between two senators to exchange information, provided the purpose of the meeting is not to agree upon final action that will be taken at a later meeting.<sup>70</sup> Discussions on the floor while the Senate is in session and discussions between senators in a committee room during committee meetings are in compliance with the rule.<sup>71</sup>

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65. FLA. S. RULE 1.441 (1993). Earlier Senate Rules had required legislative committee and subcommittee meetings and conference committee meetings to be open and noticed. See FLA. S. RULES 2.6, 2.13, and 2.19 *supra* note 36.

66. FLA. S. RULE 1.441 (1993).

67. FLA. S. JOUR. 92, 93 (Reg. Sess. 1989).

68. FLA. S. RULE 1.43(a) (1993). See *supra* note 43 and accompanying text, discussing the applicability of the Sunshine Law to gatherings of two or more members of the same board or commission.

69. FLA. S. RULE 1.43(c) (1993). Compare FLA. S. RULE 1.43(c) (1993) with cases cited *supra* note 43, discussing the applicability of the Sunshine Law to gatherings of two or more board members to discuss some matter which will foreseeably come before that board.

70. FLA. S. RULE 1.43(a) (1993).

71. *Id.* Other existing rules were amended. See McSwain, *supra* note 14, at 367 (noting that minor refinements were made to the time periods for notice specified for certain meetings of the Senate President and that an exemption from the notice and access requirements for political caucuses in Florida Senate Rule 1.44(c) was adopted when such caucuses are held to designate Senate leaders).

## B. *Open Government Amendment—Reactions by the Executive, Legislative and Judicial Branches*

### 1. The Executive Response

In its initial decision in *Locke*,<sup>72</sup> the Florida Supreme Court stated that the open records law did not apply to “constitutional officers or to their functions.”<sup>73</sup> Immediately, there was concern that the Governor and members of the Florida Cabinet, whose offices are established under the Florida Constitution,<sup>74</sup> could exempt themselves from the Public Records Law, or even the Government in the Sunshine Law.<sup>75</sup>

However, the Governor and the six cabinet officers stated that they would continue to abide by the open government laws despite the *Locke* decision.<sup>76</sup> This determination eventually proved to be the position taken by the Florida Supreme Court when it revisited *Locke* in February 1992 and held that the Public Records Law applied to the executive branch.<sup>77</sup>

Accordingly, it was apparent that the adoption of a constitutional right of access would probably impact the executive branch far less than the legislative and judicial branches.<sup>78</sup> With regard to the executive branch, the Florida Supreme Court essentially preserved the pre-amendment status quo by holding that the records and proceedings of this part of government, as opposed to the legislative and judicial branches, were subject to statutory

72. *Locke v. Hawkes*, 1991 WL 231589 (Fla. Nov. 7, 1991), *vacated and superseded* by 595 So. 2d 32 (Fla. 1992).

73. *Id.*

74. The Florida Constitution vests supreme executive power in the Governor. FLA. CONST. art. IV, § 1. The Cabinet, consisting of the Attorney General, Secretary of State, Comptroller, Treasurer, Commissioner of Agriculture, and Commissioner of Education, is created by article IV, section 4 of the Florida Constitution. FLA. CONST. art IV, § 4.

75. See Lavelle *supra* note 24, at A6. Bill Jones, executive director of Common Cause is quoted as expressing concern that the *Locke* ruling could permit meetings between Cabinet members, Cabinet aides, task force members and search committee members to occur behind closed doors: “They could close that door tomorrow if the supreme court reads the open meetings law the same way they read the public records law. The way they’re interpreting separation of powers, there’s a real possibility the [sunshine law] could go as well.” *Id.*

76. Bill Cotterell, *Butterworth Wants More Sunshine*, TALLAHASSEE DEMOCRAT, Nov. 13, 1991, at 5B.

77. *Locke*, 595 So. 2d at 37.

78. *Id.* The court stated that it granted the rehearing petitions filed after the initial *Locke* decision “to clarify our opinion and avoid improper interpretation by government entities not involved in this cause.” *Id.* The court thus limited its ruling to the legislative and judicial branches.

regulation under the Public Records Law.<sup>79</sup>

In light of the fact that the right of access to public records and meetings in the executive branch is specifically recognized in article I, section 24, the major impact of the amendment on that branch is to secure as a constitutional right that which had previously been merely a statutory guarantee, subject to the absolute discretion of the Legislature.<sup>80</sup>

However, early in the 1993 legislative session, the Governor's office recognized that once effective in July, the constitutional amendment would serve to open clemency records and proceedings. The Legislature was asked to create an exemption to these proceedings that would be "grandfathered in" prior to the July 1, 1993 effective date.<sup>81</sup>

The clemency power is derived directly from the Florida Constitution. Pursuant to article IV, section 8(a), the Governor, with the concurrence of three members of the Cabinet, may "grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses."<sup>82</sup> Because the exercise of the clemency power is a constitutional function outside the control of the legislative branch, the courts had traditionally determined that the Sunshine Law was inapplicable to the Governor and Cabinet in dispensing clemency.<sup>83</sup> However, this result would change once the constitutional amendment took effect because the open government provision would apply to constitutional entities.

The initial proposal of the Governor's staff was to create a new statute with both a public records and a sunshine exemption. Under the proposed statute, records developed or received by any state agency relating to an Executive Clemency Board investigation would be exempt from disclosure. Additionally, meetings between members of the Board of Executive

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79. *Id.*

80. FLA. CONST. art. I, § 24(a), (b).

81. *See id.* § 24(a) providing that the right of access provided therein applies to "each constitutional officer, board, and commission or entity created pursuant to law or this Constitution." Similarly, section 24(b) provides that "[a]ll meetings of any collegial public body of the executive branch of state government . . ." are open to the public. *Id.* § 24(b) (emphasis added).

82. *Id.* art. IV, § 8(a).

83. *See* *Turner v. Wainwright*, 379 So. 2d 148, 151 (Fla. 1st Dist. Ct. App. 1980), *aff'd and remanded*, 389 So. 2d 1181 (Fla. 1980); *see also* *In re* Advisory Opinion of the Governor, 334 So. 2d 561 (Fla. 1976) (clemency power does not exist by virtue of legislative enactment; rather, constitution sufficiently prescribes rules for manner of exercise of the power). *Cf.* 1977 FLA. ATT'Y GEN. ANN. REP. 65 (concluding that the Florida Administrative Procedures Act is inapplicable to the Constitution Revision Commission established by article XI, section 2 of the Florida Constitution).

Clemency (the Governor and Cabinet) would be exempt from the Sunshine Law when no official action was taken.<sup>84</sup>

The proposed clemency exemptions were included in a larger bill, House Bill 2007, which contained numerous exemptions for legislative records as well as other exemptions from the Public Records Law that were intended to apply to all agencies.<sup>85</sup> Although several amendments were made to House Bill 2007 during the legislative process, the clemency exemptions survived with only minimal modifications in the final version of the bill.<sup>86</sup>

House Bill 2007 passed the Legislature as amended on April 2, 1993, and was presented to the Governor.<sup>87</sup> However, citing concerns about the breadth of exemptions which the Legislature had granted for some of its own records, the Governor vetoed the bill.<sup>88</sup>

During the subsequent special session, the Legislature passed a narrower version of House Bill 2007. As originally introduced, Senate Bill 20-B contained the same exemption for clemency meetings and records as had existed in House Bill 2007.<sup>89</sup> However, the bill was amended to eliminate the open meetings exemption.<sup>90</sup> Thus, the final version of the bill contained only the exemption from the public records law.<sup>91</sup> Senate

84. See Fla. HB 2007 (1993). According to the staff analysis prepared by the House Governmental Operations Committee, "Gubernatorial staff" advised that the purpose of the amendment was to protect the safety of individuals providing information in a clemency investigation. For example, public disclosure of the identities of persons requesting that certain felons not be released could jeopardize the health, safety, and welfare of the reporting individuals. The same analysis reports that "gubernatorial staff" felt that it was necessary to protect brief and casual communications between the Governor and clemency board members; see also Fla. H. Comm. on Govtl. Ops., HB 2007 (1993) Final Bill Analysis and Economic Impact Statement, 8 (May 17, 1993) (vetoed by the Governor May 14, 1993).

85. Fla. HB 2007 (1993). The proposed legislative exemptions are discussed *infra* in Part III.B3.

86. The "Sunshine" exemption was amended by Representative Peebles (D-72), on the House Floor to read: "Except for clemency hearings before the Board of Executive Clemency, the provisions of s. 286.011 shall not apply to meetings of board members or their staff." FLA. H.R. JOUR. 401 (Reg. Sess. 1993).

87. FLA. S. JOUR. 1430 (Reg. Sess. 1993) (vote on passage in the Senate was 30 yeas and 5 nays).

88. FLA. H.R. JOUR. 6 (Spec. Sess. B 1993).

89. FLA. S. JOUR. 3 (Spec. Sess. B 1993).

90. FLA. S. JOUR. 83 (Spec. Sess. B 1993) (vote on passage in the Senate was 31 yeas and 6 nays).

91. The final version states: "All records developed or received by any state entity relating to a Board of Executive Clemency investigation shall be exempt from [public disclosure requirements]." Ch. 93-405, § 6, 1993 Fla. Laws 2906, 2910 (to be codified at

Bill 20-B became a law without the Governor's signature and took effect on June 30, 1993.<sup>92</sup>

Although the legislative enactments relating to clemency appeared to be the most directly related to the constitutional amendment, several other significant exemptions relating to the executive branch were also enacted in the 1993 session. These included: a law providing circumstances whereby a governmental board could meet privately with its attorney to discuss pending litigation involving the agency;<sup>93</sup> an exemption to the Public Records Law providing increased confidentiality for medical records of past, present and current employees and officers;<sup>94</sup> an exemption allowing for temporary closure of records relating to certain internal investigations;<sup>95</sup> and a new provision establishing confidentiality for certain complaints alleging discrimination in employment.<sup>96</sup>

## 2. The Judicial Response

Although early versions of the proposed open government amendment would have permitted public access to records *and* meetings within the judicial branch, with the exception of grand jury and jury deliberations,<sup>97</sup> the final version provided a right of access only to records in the judicial

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FLA. STAT. § 14.28).

92. *Id.* § 8, 1993 Fla. Laws at 2910.

93. Ch. 93-232, § 1, 1993 Fla. Laws 2374 (amending FLA. STAT. § 286.011 (1991), appearing at FLA. STAT. § 286.011(8)).

94. Ch. 93-405, § 4, 1993 Fla. Laws 2906, 2909 (amending FLA. STAT. § 119.07(3) (Supp. 1992), appearing at FLA. STAT. § 119.07(3)(cc)).

95. *Id.* (amending FLA. STAT. § 119.07(3) (Supp. 1992), appearing at FLA. STAT. § 119.07(3)(dd)).

96. *Id.* (amending FLA. STAT. § 119.07(3) (Supp. 1992), appearing at FLA. STAT. § 119.07(3)(bb)).

97. This was the approach taken in the initial proposal offered by Attorney General Butterworth on November 12, 1991. The proposed amendment stated:

Notwithstanding any other provision of this Constitution, no person shall be denied access to any meeting at which official acts are to be taken by any collegial public body in the state or by persons acting together on behalf of such a public body, with the exception of jury and grand jury deliberations.

See Statement by Attorney General Bob Butterworth, November 12, 1991; see also House Joint Resolution 863 by Representative Paul Hawkes, Republican, Crystal River, and House Joint Resolution 2035 by Representative Mary Brennan, Democrat, Pinellas Park containing similar language. For an analysis of the various proposals considered in the legislature, and their impact on the judicial branch; see generally, *Open Records Amendment Would Impact the Judiciary*, THE FLORIDA BAR NEWS, March 1, 1992, at 17.



branch of government.<sup>98</sup>

The amendment establishes a grandfather clause providing that "rules of court that are in effect on the date of adoption of this amendment [November 3, 1992] shall remain in effect until they are repealed."<sup>99</sup> Thus, the supreme court was required to adopt court rules prior to November 3, 1992, in order to authorize its own exemptions. Laws in effect prior to July 1, 1993 could limit access to records of the judicial and legislative branches until repealed.<sup>100</sup>

On September 15, 1992, the Public Records Rules Drafting Committee, led by Judge Gerald Wetherington of the Eleventh Judicial Circuit, published proposed amendments to the Rules of Judicial Administration in the Florida Bar News.<sup>101</sup> The proposed rule set forth a list of court records "which shall be confidential."<sup>102</sup> These included trial and appellate memoranda, opinion drafts, complaints alleging misconduct against judges until probable cause is established, periodical evaluations intended to improve job performance of judges, applications by persons seeking to serve as volunteers, all records currently made confidential by state or federal law, and copies of arrest and search warrants.<sup>103</sup>

The proposed rule also established confidentiality for any court records regarding a judicial determination in which confidentiality is required:

- (1) To prevent a serious and imminent threat to the fair, impartial and orderly administration of justice; or
- (2) To protect trade secrets; or
- (3) To protect a compelling governmental interest; or
- (4) To obtain evidence to determine legal issues in a case; or
- (5) To avoid substantial injury to innocent third parties; or
- (6) To avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in

98. FLA. CONST. art. I, § 24(a).

99. *Id.* § 24(d).

100. *Id.*

101. *Florida Rules of Judicial Administration*, THE FLORIDA BAR NEWS, Sept. 15, 1992, at 31 (listing the proposed amendments to the public access to judicial records rule) [hereinafter *Judicial Administration*]. The Drafting Committee also published in the same issue of the THE FLORIDA BAR NEWS notice of proposed amendments relating to access to the records of the Florida Bar. See *Proposed Amendments Deal with Confidentiality*, THE FLORIDA BAR NEWS, Sept. 15, 1992, at 25 [hereinafter *Proposed Amendments*]. However, these amendments are beyond the scope of this article.

102. See *Judicial Administration*, *supra* note 101, at 31.

103. *Id.*

the specific type of proceedings sought to be closed.<sup>104</sup>

Additionally, the rule provided procedures in the event of a denial of access (through an action for mandamus) and policies for retention of records. The proposed rule admonished that “[d]emands for access to public records under this rule shall be made in a reasonable manner which does not interfere with the normal functions or duties of the person to whom such demand is made.”<sup>105</sup>

In response to the proposed rule, the Florida Press Association and Florida Society of Newspaper Editors (“Press”) expressed concern that the proposed rules did not sufficiently distinguish between the role of the court as an employer of personnel and expender of public funds, and the role of the court as supervisor and custodian of judicial records.<sup>106</sup> The Press urged the court to make it clear that records generated as part of the judiciary’s administrative function should be governed by the same rules applicable to agencies in other branches of government.<sup>107</sup> Moreover, the Press warned that, as currently phrased, the rules were vague and ambiguous in critical areas and could allow the creation of additional confidential records in circumvention of the constitutional amendment.<sup>108</sup>

Finally, the Press objected to the portion of the rule providing that public records shall be furnished if the demand for public access is “reasonable” and “does not interfere with the normal functions or duties of the persons to which such demand is made.”<sup>109</sup> The Press stated that this paragraph authorized too much discretion and contravened the supreme court’s prior rulings. In response, at the October 5, 1992 oral argument, Judge Wetherington stated that it was his understanding that the rules simply codified existing practice and were no more restrictive than current laws and

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104. *Id.* This provision incorporates the Florida Supreme Court’s decision in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

105. *See Judicial Administration*, *supra* note 101, at 31.

106. Response Brief for the Florida Press Association and Florida Society of Newspaper Editors at 1, 2, 10-11, *In re Amendment to Florida Rules of Judicial Administration, Public Access to Judicial Records and In re Amendments to Rules Regulating The Florida Bar*, 608 So. 2d 472 (Fla. 1992) (Nos. 80419 & 80432) [hereinafter Response].

107. *Id.*

108. *Id.* at 12-13.

109. *Id.* at 17. The Press argued that the “reasonableness” and “non-interference” requirement placed too much discretion in the hands of the records custodian and contravened the supreme court’s holding in *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

rules.<sup>110</sup>

On October 29, 1992, the court issued an opinion adopting Rule 2.051, entitled Public Access to Judicial Records.<sup>111</sup> In its ruling, the court stated that “[t]he amendments to the Florida Rules of Judicial Administration are intended to reflect the judiciary’s responsibility to perform both an administrative function and an adjudicatory function.”<sup>112</sup> The court observed that in its administrative role (as public employer and expender of public funds), the judiciary is acting in an administrative capacity and hence, “should be subject to the same standards that govern similar records of other branches of government.”<sup>113</sup>

The court emphasized, however, that the judiciary’s adjudicatory responsibilities, require a “modified policy toward public inspection.”<sup>114</sup> In order for the judiciary to perform these responsibilities and protect “the rights of all citizens” some exceptions to public access were necessary.<sup>115</sup>

The court thus adopted the rules as proposed by the drafting committee. However, some provisions were narrowed in an apparent attempt to avoid their use to shield “administrative” records which would be open in other agencies.<sup>116</sup> In addition, the provision dealing with responses to public records requests was modified to provide: “Requests and responses to requests for access to public records under this rule shall be made in a reasonable manner.”<sup>117</sup>

110. Gary Blankenship, *Justices Ponder Public Access to Courts, Bar*, THE FLORIDA BAR NEWS, Oct. 15, 1992, at 1, 14.

111. *In re* Amendments to the Florida Rules of Judicial Administration—Public Access to Judicial Records, 608 So. 2d 472 (Fla. 1992) [hereinafter *Public Access*]

112. *Id.* at 472.

113. *Id.* at 472-73. This point was perhaps most strongly made by Justice Overton in his concurring opinion in which he stated:

I concur and write only to emphasize that, as I read these rules: (1) there is no change regarding the presumption of openness of court records, as set forth in *Barron v. Florida Freedom Newspapers, Inc.*, and (2) the judicial branch’s administrative documents, including personnel and finance records, are being treated the same as similar records in the executive and legislative branches.

*Id.* at 473 (citation omitted).

114. *Id.*

115. *Public Access*, 608 So. 2d at 473.

116. See, e.g., *Judicial Administration*, *supra* note 101, at 31 (proposed rule, which was not adopted, provided for confidentiality of “preliminary drafts, notes, or other written materials which reflect the tentative thought processes of court committees and judicial conferences, and the members thereof, assigned to perform functions affecting the administration of justice in Florida.”).

117. *Public Access*, 608 So. 2d at 475.

### 3. The Legislative Response

Of the three branches of government, the legislative branch faced perhaps the greatest impact. Because of the open government amendment, the Legislature was now subject to public access requirements established by constitutional mandate; historically, the Legislature had argued that it alone had the power to determine which of its records were open and which were not.<sup>118</sup>

However, the amendment also affected the Legislature by placing limitations on the manner in which public records' exemptions could be enacted both for itself and for all other agencies.<sup>119</sup> Prior to the amendment, the only restrictions, other than the general "single subject rule" and similar constitutional<sup>120</sup> provisions applicable to legislative enactments in general, were a self-imposed statutory directive to consider certain factors when determining whether to enact or continue exemptions from the open government laws.<sup>121</sup> There was little to prevent the Legislature from

118. See *supra* notes 12 and 13, for earlier decisions regarding the Legislature's authority to establish its own rules governing access. This position was expressly adopted by the Florida Supreme Court in both *Locke* decisions. Until the passage of Senate Bill 20 in the 1993 Session, legislative records available to the public were set forth in Florida House Rule 1.11 and Rule 1.442. See Staff of Fla. S. Comm. on Pub. Rec., SB 20 (1993) Staff Analysis (May 25, 1993) (on file with Comm.).

119. FLA. CONST. art. I, § 24(c), (d).

120. See FLA. CONST. art. III, § 6, which provides: The Florida Constitution states: Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida:."

Other procedural requirements relating to publication are set forth in article III, section 7 of the Florida Constitution.

121. See FLA. STAT. § 119.14(2) (1991). Exemptions are possible only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

However, the impact of this statutory directive is somewhat weakened by 4(g) of this section, providing:

- (g) Notwithstanding the provision of s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption pursuant to this act. The failure of the Legisla-

placing an exemption deep within a bill filled with numerous other issues.<sup>122</sup> Occasionally, the absence of a “single subject rule” for exemptions resulted in bills passing the Legislature which were later deemed to be a “mistake” and subsequently vetoed by the Governor.<sup>123</sup>

Under article I, section 24, the Legislature is authorized to enact general laws providing for exemptions from the access requirements; however, any law creating an exemption must expressly state the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the law.<sup>124</sup> Further, any law creating an exemption or governing enforcement must relate to one subject and shall contain only exemptions and provisions relating to enforcement.<sup>125</sup> These provisions will be in place for the 1994 legislative session.

The session following the adoption of the amendment but prior to its taking effect—the 1993 session—was of critical importance because it was the final opportunity for the Legislature to determine which of its records were going to be open and which were not. Any exemptions enacted during this time would be “grandfathered in” once the constitutional amendment took effect in July; all other records would be subject to constitutional access requirements.<sup>126</sup>

On February 23, 1993, the Legislature responded to the challenge with the introduction of House Bill 2007, by Representative Boyd and the

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ture to comply strictly with this section shall not invalidate an otherwise valid reenactment.

*Id.*

122. For example, in 1989, a public records exemption was enacted for certain claims records involved with an agency’s risk management program. The provision was added on the floor of the House of Representatives as Section 92 of an act “relating to insurance and the State Fire Marshall.” See FLA. H.R. JOUR. 1349-79 (Reg. Sess. 1989).

123. For example, in the closing days of the 1993 Session an amendment to an exemption found in section 119.07(3)(z) of the Public Records Act was inserted on the Senate floor as an addition to a bill expanding the definition of “criminal justice agency.” See FLA. S. JOUR. 545 (Reg. Sess. 1993). A newspaper reporter subsequently reported that the bill “accidentally exempted most of the state’s [police] and court records from the public records law . . . .” Lucy Morgan, *Legislature Accidentally Closes Police, Court Records*, ST. PETERSBURG TIMES, Apr. 16, 1993, at 5B. The sponsor of the bill stated that he was unaware of this result when he offered the proposal. The Governor concurred that the exemption was too broad and noted that this “was not the intention of the sponsor of the legislation” and vetoed the bill on May 4, 1993. *Id.*

124. FLA. CONST. art. I, § 24(c).

125. *Id.* § 24(d).

126. *Id.*

Committee on Governmental Operations.<sup>127</sup> As proposed, the bill provided for the following key exemptions from disclosure.

A formal complaint about a member or officer of the Legislature or about a lobbyist would be exempt until dismissal of the complaint, determination as to probable cause, or the respondent had requested that the complaint be made public, whichever occurred first. Other exemptions applied to drafts of legislative material which were not provided to any person other than a member, officer, or employee of the Legislature and to records prepared for or used in executive sessions of the Senate until fifty years after the session was held. The bill also provided confidentiality for these records held by the Legislature which would be exempt from disclosure.

House Bill 2007 passed with one amendment and was certified to the Senate on March 11, 1993.<sup>128</sup> The full Senate took up the bill on March 31, 1993.<sup>129</sup> The Committee on Rules and Calendar and Senator Jennings moved an amendment to strike everything after the enacting clause and substitute a new version of the bill.<sup>130</sup> The revised bill substantially expanded the exemptions provided in the House-passed bill. Specifically, the following changes were made:

(1) While records of future executive sessions would become public in ten years, “[r]ecords of former legislative investigating committees whose records are sealed or confidential as of June 30, 1993” would not be subject to disclosure until December 31, 2028.<sup>131</sup>

(2) Requests for advisory opinions concerning application of legislative ethics rules would not be public unless the requestor authorized release.<sup>132</sup>

(3) “Requests for, and drafts of, bills, amendments, reapportionment plans, and redistricting plans, including supporting documentation; and [w]orking papers of employees, officers or members, relating to their official or legislative oversight responsibilities” were exempted from disclosure and copying.<sup>133</sup>

An additional amendment was offered by Senators Weinstein, Sullivan, Boczar, Holzendorf, Beard, Forman, Johnson and Grant to exempt “[c]orrespondence received or sent from a member of the Legislature” and

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127. FLA. H.R. JOUR. 222 (Reg. Sess. 1993).

128. *Id.* at 427-28.

129. FLA. S. JOUR. 615 (Reg. Sess. 1993).

130. *Id.* (amendment 1).

131. *Id.* (amendment 1(2)(d)).

132. *Id.* (amendment 1(2)(f)).

133. *Id.* (amendment 2(g), (b)).

“[w]orking papers relating to constituent casework.”<sup>134</sup> This amendment was adopted and House Bill 2007, as amended, was approved by a vote of thirty-eight to zero.<sup>135</sup> Senator Jennings then offered an additional amendment relating to the records of former legislative investigating committees to provide that such records are subject to disclosure, except that the names of persons testifying before such committees were to be deleted.<sup>136</sup>

On its return to the House, the Senate inspired version of House Bill 2007 was amended again to narrow the exemptions added on the Senate side. On motion by Representative Boyd, the House adopted an amendment to the Senate amendment to strike everything after the enacting clause and inserted new language.<sup>137</sup> Specifically, the House amendment limited the exemption for legislative correspondence to those portions of correspondence which, if disclosed, would reveal,

information otherwise exempt from disclosure by law; an individual's medical treatment, history, or condition; the identity or location of an individual if there is a substantial likelihood that releasing such information would jeopardize the health or safety of that individual; or information regarding physical abuse, child abuse, spouse abuse, or abuse of the elderly . . . .<sup>138</sup>

The exemption relating to “working papers” was modified to apply to “[w]orking papers of employees, officers, or members relating to their legislative responsibilities.”<sup>139</sup> The House amendment also spelled out the “supporting documentation” relating to bills which could be withheld as “supporting documentation to or for bills, resolutions, memorials, amendments, bill analyses, fiscal notes, reapportionment plans and redistricting plans.”<sup>140</sup> As amended, the bill passed the House with 114 yeas and 0 nays.<sup>141</sup>

The bill returned to the Senate. This time the Senate concurred with the House amendments and the bill was approved by a 30 to 5 vote as the

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134. FLA. S. JOUR. at 616 (amendment 1(d)).

135. *Id.*

136. *Id.*

137. FLA. H.R. JOUR. 1515, 1516 (Reg. Sess. 1993) (House Amendment 1 to Senate Amendment 1).

138. *Id.* (section (a), (h)).

139. *Id.* (section (2)(c)).

140. *Id.* (section (2)(d)).

141. *Id.* at 1517.

regular session drew to a close.<sup>142</sup>

Florida newspapers, not surprisingly, were critical of House Bill 2007. It was described by the Florida Press Association and the Florida Society of Newspaper Editors as opening a "major loophole" in the open government law and establishing a "terrible precedent."<sup>143</sup>

Although early reports indicated that Governor Chiles was prepared to allow the bill to become law without his signature,<sup>144</sup> he subsequently vetoed the measure. In withholding his approval, the Governor wrote that he was concerned about the breadth of the exemptions for working papers and legislative drafts. The Governor stated that these provisions had not been granted to other governmental entities and served to frustrate the will of the people as expressed in the passage of the open government constitutional amendment. According to the Governor, the exemptions impeded "public understanding of influences on, and the purpose of, legislation, and diminishes the ability of Floridians to hold their lawmakers accountable."<sup>145</sup>

In the ensuing special session, the Legislature refined the legislative exemptions bill in an attempt to address the Governor's concerns. The staff analysis for Senate Bill 20 B noted that in his veto message on House Bill 2007, the Governor stated that most of the exemptions in that bill were "appropriate and necessary to a smooth running government."<sup>146</sup> However, staff commented that neither the constitutional amendment nor the Governor had defined what constitutes an "appropriate" exemption. According to staff, this determination must therefore be a "policy" question.<sup>147</sup>

The "policy" reflected in Senate Bill 20 essentially focused on meeting the objections noted by Governor Chiles to the doomed House Bill 2007. This meant that the provisions relating to legislative working drafts and working papers required revision. Instead of the broad exemption for

142. FLA. S. JOUR. 1428, 1430 (Reg. Sess. 1993).

143. Louis Lavelle, *State Newspapers ask Governor for Public Access to State Records*, TAMPA TRIBUNE, May 11, 1993, at B3.

144. Lucy Morgan, *Records Secret Bill is to Become Law*, ST. PETERSBURG TIMES, May 12, 1993, at B3.

145. *Id.*

146. See Staff of Fla. S. Comm. on Pub. Rec., SB 20 (1993) Staff Analysis 5 (May 25, 1993) (on file with Comm.).

147. *Id.* However, it might be noted that the constitutional amendment appears to set forth policy considerations to be considered in the enactment of exemptions by stating that such "law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the Law." *Id.*



preliminary documents contained in the earlier bill, Senate Bill 20 narrowed the exemption to those documents which had not yet been circulated outside the legislative arena.

Thus, legislative produced bill drafts, and requests for drafts, are exempt from disclosure if they have not been provided to any person other than the member or members who requested the draft, an employee of the Legislature, a contract employee or consultant retained by the Legislature, or an officer of the Legislature. Bill analysis drafts or fiscal note drafts are exempt from disclosure until the bill analysis or fiscal note is provided to a person other than a legislative employee, a contract employee or consultant retained by the Legislature, or an officer of the Legislature. In addition, drafts or requests for drafts of a reappointment plan or redistricting plan and amendments are exempt. "Supporting documents" used in connection with reapportionment or redistricting plans are exempt "until a bill implementing the plan, or the amendment, is filed."<sup>148</sup>

This bill appeared to represent a consensus view and was quickly passed in the Legislature.<sup>149</sup> The only revision of significance was to remove the Sunshine Law exemption for informal clemency meetings which had been requested by the Governor's office and had been contained in the vetoed House Bill 2007.<sup>150</sup> Although there was some grumbling in the media that the exemptions in Senate Bill 20 were still too broad,<sup>151</sup> the Governor allowed the bill to become law without his signature. Senate Bill 20, now Chapter 93-405 of the Laws of Florida, took effect June 30, 1993.<sup>152</sup>

#### IV. CONCLUSION

With the passage of the open legislative meetings constitutional amendment in 1990 and two years later, the open government constitutional amendment, Floridians have overwhelmingly voiced their approval for government in the sunshine at all levels of government. It is still too early, however, to assess the full extent to which government will give effect to the expressed will of the people.

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148. Ch. 93-405, § 1, 1993 Fla. Laws 2906, 2907 (to be codified at FLA. STAT. § 11.0431(2)(e)).

149. FLA. S. JOUR. 83 (Spec. Sess. B 1993).

150. FLA. S. JOUR. 3 (Spec. Sess. B 1993).

151. See, e.g., Lucy Morgan, *Bill to Limit Records Access Advances*, ST. PETERSBURG TIMES, May 26, 1993, at B3.

152. Ch. 93-405, § 8, 1993 Fla. Laws 2906, 2910 (to be codified at FLA. STAT. § 14.28).

Allegations of legislative meetings behind closed doors still arise.<sup>153</sup> The legislative open meetings amendment provides that it is the Legislature, not the courts, which has the right to interpret and enforce its terms. While both houses have adopted rules to implement the legislative open meetings amendment, it is not yet clear how well the Legislature will fulfill its role in enforcing those provisions. The first test for the open government amendment will come in the 1994 legislative session as the Florida Legislature implements for the first time the procedural safeguards contained in article I, section 24 of the Florida Constitution that are intended to assure that the public interest in open government is given equal consideration when proposal for closure are considered.

The challenge issued by the people by their overwhelming support of these two constitutional amendments, however, cannot be ignored. For the people of this state have recognized that open government provides the best assurances that the people will get good government that is responsive and responsible to its needs.

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153. See, e.g., Lucy Morgan, *Discord Hits Lunch of Hours of Power*, ST. PETERSBURG TIMES, March 9, 1993 at B1 (lobbyist invited five members of the Senate Commerce Committee to lunch to discuss a bill to benefit his clients and sought to eject newspaper reporter who showed up at the gathering, thus "creating a situation that appears to be in direct violation of Senate rules and the state's open government laws"); Judy Doyle, *Lobbyist Holds Secret Meeting with Senators*, TALLAHASSEE DEMOCRAT, March 9, 1993, at A1.

# The Process and Politics of Legislative Reapportionment and Redistricting Under the Florida Constitution

George L. Waas\*

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\* George L. Waas was admitted to The Florida Bar in 1970. He received a B.S. in journalism from the University of Florida in 1965 and a J.D. in 1970 from Florida State University.

Since 1987, Mr. Waas has been employed by the Florida Attorney General's Office as an Assistant Attorney General. From 1986 to 1987, he was counsel to the Division of Elections, Department of State. From 1980 to 1986, he was in private practice. He also served as counsel to the Departments of Transportation, Health and Rehabilitative Services, and Commerce.

Mr. Waas currently handles civil trials and appeals, with emphasis on governmental law representation. In addition to handling numerous cases covering the breadth of public agency and official representation, Mr. Waas handles First Amendment litigation, and elections and voting rights cases. He served as counsel in major judicial elections, voting rights cases and reapportionment litigation heard by the United States Supreme Court. Additionally, Mr. Waas has argued a case for the Attorney General's Office before the United States Supreme Court.

Mr. Waas is a frequent lecturer for continuing legal education programs, and has written numerous articles for *The Florida Bar Journal*, as well as the Florida State University and Nova University *Law Reviews*. Mr. Waas is admitted to practice before all U.S. District Courts of Florida, including the Southern District Trial Bar, the Eleventh, Fifth, and District of Columbia United States Circuit Courts of Appeals, and the United States Supreme Court.

## I. INTRODUCTION

Reapportionment<sup>1</sup> and redistricting<sup>2</sup> of the State Legislature are initially and predominantly functions of the State Legislature.<sup>3</sup> These tasks are accomplished by article III, section 16 of the Florida Constitution which requires the participation of each of the three branches of government.<sup>4</sup> On

1. "Reapportionment" is the redistribution of the number of legislative seats. *See* FLA. CONST. art. III, § 16(a). For example, the decision as to how many legislative seats to have within the 30-40 senatorial districts and the 80-120 representative districts allowed under article III, section 16(a) of the Florida Constitution is a reapportionment decision. *See id.*

2. "Redistricting" is the redrawing of district lines or boundaries once the number of district seats is determined. In this article, reapportioning and redistricting will be used interchangeably, with emphasis on the redistricting process.

3. *See* FLA. CONST. art. III, § 16(a). The United States Supreme Court has repeatedly held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body." *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

4. The primary responsibility resides with the State Legislature to enact a redistricting plan. *See* FLA. CONST. art. III, § 16(c). The Attorney General must submit the plan to the Supreme Court of Florida for a declaratory judgment determining its validity. *Id.* The Governor's role is to call for extraordinary legislative sessions when the court finds the redistricting plan to be invalid. FLA. CONST. art. III, § 16(d).

The constitutional provision reads as follows:

Section 16. Legislative apportionment.—

(a) SENATORIAL AND REPRESENTATIVE DISTRICTS. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.

(b) FAILURE OF LEGISLATURE TO APPORTION; JUDICIAL REAPPORTIONMENT. In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, the attorney general shall, within five days, petition the supreme court of the state to make such apportionment. No later than the sixtieth day after the filing of such petition, the supreme court shall file with the secretary of state an order making such apportionment.

(c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining

three separate occasions during 1972, 1982, and 1992, this section served as the procedural framework for redistricting the Florida Senate and House of Representatives. However, as the contentious 1992 redistricting effort graphically demonstrates, this constitutional provision does not eliminate the partisan politics that permeate the process.

As a result of the politically divisive 1992 legislative struggle over the redistricting of the State Legislature, efforts were undertaken during the 1993 legislative session to alter or eliminate this constitutional procedure which maximizes government involvement by requiring participation by all three branches of state government. Proposals were made to either replace the present system with an appointed commission, or involve such a commission with legislative efforts. Although these proposals did not pass, the seeds of change appear to have been planted by the discord of 1992.

To understand how the state has gotten to this point after only three redistricting experiences, it is necessary to examine the genesis of this constitutional provision, study its procedural and substantive requirements with particular emphasis on federal law considerations, trace its operation

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the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) EFFECT OF JUDGMENT IN APPORTIONMENT; EXTRAORDINARY APPORTIONMENT SESSION. A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.

(e) EXTRAORDINARY APPORTIONMENT SESSION; REVIEW OF APPORTIONMENT. Within fifteen days after the adjournment of an extraordinary apportionment session, the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment shall be had as provided for in cases of such joint resolution adopted at a regular or special apportionment session.

(f) JUDICIAL REAPPORTIONMENT. Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court determine that the apportionment made is invalid, the court shall, not later than sixty days after receiving the petition of the attorney general, file with the secretary of state an order making such apportionment.

*Id.*

during 1972 and 1982, explore the contentious 1992 redistricting battle, and then look at proposed changes to see if they might improve upon the existing provision.

## II. HISTORICAL OVERVIEW OF REDISTRICTING IN FLORIDA

### A. *The Former Provisions*

Florida Constitution, article III, section 16 is a product of the 1965 Florida Constitution Revision Commission's efforts which ultimately led to the present Florida Constitution, adopted by the voters in 1968. The Commission's work on the legislative redistricting provision, however, had its roots in the United States Supreme Court decision of *Baker v. Carr*.<sup>5</sup> In *Baker*, the Court tossed the lower courts into a "political thicket"<sup>6</sup> by holding that legislative redistricting presented a justiciable issue.<sup>7</sup> Ensuing litigation challenged Florida's legislative districts as being malapportioned.<sup>8</sup>

The history of redistricting litigation in Florida is a study of the rapid migration into, and urbanization of, a state that had been traditionally controlled politically by rural interests. The explosive urban growth that began in the 1950's came at a time when minorities, particularly Blacks, were seeking, and to some degree realizing, a greater voice in the political processes. This stronger minority voice can be seen in the United States Supreme Court desegregation decisions of the mid-1950's<sup>9</sup> and the passage of both the Civil Rights Act<sup>10</sup> and Voting Rights Act<sup>11</sup> in the mid-1960's.

5. 369 U.S. 186 (1962).

6. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

7. See *Baker*, 369 U.S. at 209.

8. These cases are commonly referred to as the *Swann* litigation. See *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962); *Sobel v. Adams*, 214 F. Supp. 811 (S.D. Fla. 1963), *rev'd sub nom.* *Swann v. Adams*, 378 U.S. 553 (1964); *Swann v. Adam*, 383 U.S. 210 (1966); *Swann v. Adams*, 258 F. Supp. 819 (S.D. Fla. 1965), *rev'd*, 385 U.S. 440 (1967); *Swann v. Adams*, 263 F. Supp. 225 (S.D. Fla. 1967). See also *In re Apportionment Law Appearing As Senate Joint Resolution 1 E*, 1982 Special Apportionment Session, 414 So. 2d 1040, 1048 (Fla. 1982).

"Malapportionment" is the inequitable distribution of legislative seats created either by the failure to reapportion at regular intervals based on population formula, or by the use of a population formula that discriminates against a group or geographical area of the state. Both practices are illegal under *Baker* and its progeny.

9. See, for example, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and its progeny.

10. 42 U.S.C. § 2000a (1988).

11. *Id.* § 1973.

Each Florida redistricting case represents a microcosm of the population shift from rural to urban domination and the attendant emergence of minorities toward becoming a potent political focus, all reflected in the battle for legislative power.

Prior to the adoption of the 1968 Constitution, the provision controlling legislative redistricting was article VII, section 3 of the 1885 Constitution which required legislative districts

to be as nearly equal in population as practicable, but no county shall be divided in making such apportionment, and each District shall have one Senator; and, at the same time, the Legislature shall also apportion the Representation in the House of Representatives, and shall allow three (3) Representatives to each of the five most populous counties, and two (2) Representatives to each of the next eighteen more populous counties, and one Representative to each of the remaining counties of the State at the time of such apportionment.<sup>12</sup>

Thus, as demonstrated in *Sobel v. Adams*, a relatively small number of voters could elect a majority of the Legislature:

Each of the three representatives in the Florida House of Representatives from Dade County, the most populous county in the State, represents the equivalent of 311,000 people according to the 1960 Federal census. The member from Gilchrist, the least populous county, would represent 2,868 residents. The five most populous counties

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12. FLA. CONST. of 1885, art. VII, § 3. The 1885 constitutional provision called for 38 Senate districts. *Id.* Prior to 1885, redistricting was governed by article IX of the Florida Constitutions of 1838, 1861, 1865 and article XIII of the Florida Constitution of 1868.

The 1838, 1861, and 1865 Constitutions provided for one representative for each county, with increases in the number of representatives based on a uniform population ratio, which would remain in place until a new census was taken. FLA. CONST. of 1838, art. IX, § 1; FLA. CONST. of 1861, art. IX, § 1; FLA. CONST. of 1865, art. IX, § 1. The Senate was not to be less than one-fourth nor more than one-half the number of representatives. FLA. CONST. of 1838, art. IX, § 2; FLA. CONST. of 1861, art. IX, § 2; FLA. CONST. of 1865, art. IX, § 2.

The 1868 Constitution gave each county one representative, plus an additional representative for each 1000 registered voters, up to a maximum of four for any county. FLA. CONST. of 1868, art. XIII, § 1. The Senate remained essentially unchanged. *See* 25A FLA. STAT. ANN. 672 (West 1991) (annot. to FLA. CONST. art. XII, § 10). The 1885 Constitution, as amended in 1950, provided that the official federal census would be the official Florida census upon which the Legislature would rely. FLA. CONST. of 1885, art. VII, § 5 (1950). Prior to this amendment, the 1885 Constitution required the Legislature to enumerate by county all of the state's inhabitants. *Id.*

average one representative for each 106,000 people. The five least populous counties average one representative for each 3,266 people. The membership of the Florida Senate, considered on a basis of representation of numbers, would show a similar disparity between the more populous and the less populous areas.<sup>13</sup>

The three-judge court<sup>14</sup> in *Sobel*, considering a constitutional challenge based on urban-rural population inequality as opposed to pure race-based variance, found the 1962 redistricting plan before it invidiously discriminatory and contrary to the Equal Protection Clause of the Fourteenth Amendment, but gave the Legislature the opportunity to remedy the violation.<sup>15</sup> The federal court, upon reviewing the Legislature's new plan, proceeded to validate it.<sup>16</sup> On review, the United States Supreme Court reversed and remanded the case for consideration of the Fourteenth Amendment's requirements of the use of population as a basis for redistricting and permitting deviations only if supported by legitimate considerations implicating rational state policies as set out in *Reynolds v. Sims*.<sup>17</sup>

On remand, the federal district court deferred action until after the 1965 legislative session, during which the Legislature adopted another redistricting plan.<sup>18</sup> The district court held that the new plan did not meet constitutional requirements; however, the plan would be implemented on an interim basis expiring sixty days after adjournment of the 1967 legislative session.<sup>19</sup> The United States Supreme Court, finding no basis for allowing interim implementation of an unconstitutional malapportioned plan, reversed the district court and remanded the cause for the purpose of effectuating a valid plan for the 1966 elections.<sup>20</sup>

In March, 1966, the Legislature adopted yet another plan which provided for multi-member districts with population deviations in the Senate in excess of twenty-six percent and in the House in excess of thirty-four percent.<sup>21</sup> The United States Supreme Court once again invalidated the

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13. *Sobel*, 208 F. Supp. at 317.

14. Litigation challenging any statewide legislative redistricting is heard by a three-judge federal district court. 28 U.S.C. § 2284 (1988).

15. *Sobel*, 208 F. Supp. at 318-19.

16. *Sobel*, 214 F. Supp. at 812.

17. See *Swann*, 378 U.S. at 553; *Reynolds v. Sims*, 377 U.S. 533 (1964).

18. *Sobel*, 258 F. Supp. at 820.

19. *Id.* at 822.

20. *Swann*, 383 U.S. at 211-12.

21. See *Sobel*, 258 F. Supp. at 826. As demonstrated herein, Florida Constitution article III, section 16 requires redistricting in conformity with the Federal Constitution. Population



plan because the state had not justified these deviations on rational state policy grounds.<sup>22</sup> On remand, the district court, finding Florida's plan constitutionally infirm, took it upon itself to redistrict the State into forty-eight Senate districts and 119 House districts.<sup>23</sup> The 1968 Constitution Revision Commission wanted to avoid further litigation by providing a mechanism for ultimate judicial review by the Florida Supreme Court.<sup>24</sup> During its deliberations, the Commission's main focus was on the importance of the one person, one vote principle, as well as the contiguity and relative size of districts.<sup>25</sup>

## B. *The Current Provision*

### 1. Overview of Substantive Considerations

Florida Constitution, article III, section 16 was born of this five-year litigation chronology and requires the Legislature, by joint resolution not subject to gubernatorial veto, to reapportion the state into not less than thirty nor more than forty senatorial districts, and into not less than eighty nor more than 120 representative districts, in accordance with both the state and Federal Constitutions.<sup>26</sup> This must be accomplished during the regular session of the Legislature convened "in the second year following each decennial census."<sup>27</sup> The provision further requires that both Houses consist of "consecutively numbered . . . districts of either contiguous, overlapping or identical territory."<sup>28</sup> "Contiguous" means sharing a

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deviation is a factor in the one person, one vote mandate. Population deviation is the difference between a district's actual population, and the "ideal" population determined by dividing the total state population by the number of districts. For example, if a state has a population of 10,000,000 and a 100-seat legislative body, the ideal population district is 10,000,000 divided by 100 or 100,000.

22. *Swann*, 385 U.S. at 573.

23. *Swann*, 263 F. Supp. at 226. The court further held that the term of office for those elected under this plan would expire with the 1968 general elections. *Id.* at 228.

24. See Constitution Revision Commission Convention Proceedings, 11-28-66 to 1-7-67, Vol. 22 Series 722.

25. *Id.*

26. FLA. CONST. art. III, § 16(a).

27. *Id.* The decennial census is conducted in every year ending in zero. See 13 U.S.C. § 141 (1988). The Florida Constitution provides that "[e]ach decennial census of the state taken by the United States shall be an official census of the state" and "become(s) effective on the thirtieth day after the final adjournment of the regular session of the legislature convened next after certification of the census." FLA. CONST. art. X, § 8.

28. FLA. CONST. art. III, § 16(a).

common boundary for a reasonably significant distance; "overlapping" means sharing some of the territory of two districts; "identical" means two districts following the same lines.<sup>29</sup>

The state constitutional requirement that redistricting be accomplished in accordance with the Federal Constitution necessitates inquiry of the one person, one vote principle. Specifically, population deviation, the profound implications of the Federal Voting Rights Act of 1965, as amended, political gerrymandering and other federally recognized factors have to be considered in the process.

The United States Constitution, Article I, Section 2 governs apportionment of the United States House of Representatives and requires that redistricting of that body be approached with the objective of achieving zero deviation from population equality.<sup>30</sup> The ideal district population is determined by dividing the state's total population by the number of seats assigned to the state.<sup>31</sup> A state's total deviation is determined by adding the percentage above the ideal population of the largest district and the percentage below the ideal population of the smallest district. The United States Supreme Court, in *Kirkpatrick v. Preisler*,<sup>32</sup> held that there is no point at which population deviations become de minimis or insignificant for congressional reapportionment; states are required to make a good faith effort to achieve mathematical equality.<sup>33</sup> Any deviation from precise mathematical equality with regard to congressional redistricting is examined with a jaundiced eye. Only where population variances are unavoidable despite a good faith effort to achieve zero deviation, or where there is a compelling justification for the deviation, will the court accept such variances.<sup>34</sup>

While the Federal Constitution, Article I, Section 2 controls congressional reapportionment and redistricting, the Equal Protection Clause of the Fourteenth Amendment applies to state legislative realignment. In *Reynolds*

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29. See *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 1982 Special Apportionment Session, 414 So. 2d 1040, 1050 (Fla. 1982). These considerations are addressed further in part III of this article.

30. See U.S. CONST. art I, § 2; *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

31. See *Kirkpatrick*, 394 U.S. at 528. Congressional districts are all single-member. 2 U.S.C. § 2(a) (1988). By the 1990 census, Florida was accorded 23 congressional districts.

32. 394 U.S. at 526.

33. *Id.* at 530-31.

34. *White v. Weiser*, 412 U.S. 783, 790 (1973). Population variance is determined by taking the difference between a district's actual population and ideal population, and dividing that number by the ideal population. This results in the percentage proportion by which a district's population exceeds or is below the ideal population.

v. *Sims*,<sup>35</sup> the Court recognized that the Equal Protection Clause provides for more flexibility with respect to state legislative apportionment.<sup>36</sup> However, states are still required to make an honest and good faith effort to draw districts as near to equal population as is practical.<sup>37</sup> The *Reynolds* Court recognized that mathematical exactness or precision is not necessarily a workable constitutional requirement in the state legislative process, and that some deviations are constitutionally permissible so long as the variances from a strict population standard are based on legitimate state policy consideration.<sup>38</sup> The Court cautioned, however, that even where there may be rational state policy considerations for population deviations among the several legislative districts, population is still the controlling consideration, and population equality the ultimate goal.<sup>39</sup>

The *Reynolds* Court declined to spell out any precise constitutional test for population variance propriety, deciding instead to consider each case on its particular factual basis. However, the Court, in *Mahan v. Howell*,<sup>40</sup> suggested the outer limits of allowable population variation among legislative districts when it held that a 16.4% variation did not exceed the limits under which equal protection would be satisfied. However, the Court cautioned that its view was limited to the particular and complex facts of that case.<sup>41</sup> In *Connor v. Finch*<sup>42</sup> and *Chapman v. Meier*,<sup>43</sup> the Court held that variations of sixteen to twenty percent were constitutionally unacceptable.<sup>44</sup>

In *White v. Register*<sup>45</sup> and *Gaffney v. Cummings*,<sup>46</sup> the Court held that population deviations of less than ten percent were *ipso facto* acceptable as de minimis in the face of a challenge of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>47</sup>

Through the 1982 redistricting process, minorities claiming that their respective voting power was negated or diluted as a result of skewed

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35. 377 U.S. 533 (1964).

36. *Id.* at 578.

37. *Id.* at 577.

38. *Id.*

39. *Id.* at 567.

40. 410 U.S. 315, *modified*, 411 U.S. 922 (1973).

41. *Id.*

42. 431 U.S. 407 (1977).

43. 420 U.S. 1 (1975).

44. *Connor*, 431 U.S. at 417; *Chapman*, 420 U.S. at 24.

45. 412 U.S. 755 (1973).

46. 412 U.S. 735 (1973).

47. *Id.*; *White*, 412 U.S. at 764.

boundary lines had to rely on the Voting Rights Act of 1965<sup>48</sup> and the Fourteenth and Fifteenth Amendments to the United States Constitution, all of which required a showing of purposeful discriminatory intent.<sup>49</sup> This intent requirement spurred Congress to amend the Voting Rights Act by eliminating a showing of intent and imposing a results standard which allows affected minorities to prove a violation of federal law by establishing that they did not have an equal opportunity to "participate in the political process and to elect representatives of their choice" as a result of a voting practice or procedure, including a legislative redistricting plan.<sup>50</sup> The 1982 amendments to the Voting Rights Act were first considered by the United States Supreme Court in *Thornburg v. Gingles*<sup>51</sup> which involved a challenge to legislative redistricting plans in North Carolina calling for one multi-member senate district, one single-member senate district, and five multi-member house districts. The Court held that challengers to a redistricting plan must prove the following three threshold conditions: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that it is "politically cohesive;" and (3) that, in the absence of special circumstances, such as incumbency, bloc voting by the white majority usually defeats the minority's preferred candidate.<sup>52</sup>

Once these three conditions are established, certain objective factors must be considered by the court in determining whether, from the "totality of the circumstances,"<sup>53</sup> a violation has occurred.<sup>54</sup> These totality factors

48. 42 U.S.C. § 1973(b) (1988).

49. See *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980).

50. 42 U.S.C. § 1973(b) (1988). This is commonly referred to as Section 2 of the Voting Rights Act of 1965 as amended. Section 2 provides:

A violation of [Section 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [Section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

*Id.*

51. 478 U.S. 30 (1986).

52. *Id.* at 50-51.

53. See *id.* at 43.

54. *Id.* at 46.

include the following: (1) the extent of the history of official discrimination touching on the class participation in the democratic process; (2) racially polarized voting; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions,<sup>55</sup> or other voting practices that enhance the opportunity for discrimination; (4) denial of access to the candidate slating process for members of the class; (5) the extent to which the members of the minority group bear the effects of discrimination in areas such as education, employment, and health which hinder effective participation; (6) whether political campaigns have been characterized by racial appeal; (7) the extent to which members of the protected class have been elected; (8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the minority group; and (9) whether the policy underlying the use of the voting qualification, standard, practice or procedure is tenuous.<sup>56</sup>

This list is not exhaustive; other factors may be relevant, and it is not necessary that all, or any number of factors, be proved.<sup>57</sup> Litigation under Section 2 is highly fact-intensive, and must be decided on a case-by-case basis.<sup>58</sup> Therefore, for challengers to prevail on a vote dilution claim under Section 2 of the Voting Rights Act, they must ultimately show that under the totality of the circumstances, the legislative redistricting scheme “has the effect of diminishing or abridging the voting strength of the protected [minority] class.”<sup>59</sup>

In addition to the availability of Section 2 of the Voting Rights Act of 1965, as amended, to allow minorities such as Blacks and Hispanics to challenge redistricting plans that dilute the relative strength of minority

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55. Under single-shot voting, a voter may cast as many votes as there are candidates in a pool, or the voters may choose to vote for a lesser number of candidates. This tends to allow factions to target, or single-shot, particular candidates.

56. *Id.* at 44-45.

57. *Thornburg*, 478 U.S. at 45.

58. *See id.* at 46.

59. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). As the cases noted below demonstrate, implicit concerns in the vote dilution analysis include packing and fracturing of a cohesive minority group. “Packing” is the concentration of a minority group into one or more districts so that the group constitutes an overwhelming majority in those districts, thereby negating the relative voting strength of a percentage of the total minority vote. *Ryicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1093 (N.D. Ill. 1982). “Fracturing” is the breaking off of small percentages of a bloc of minority voters for inclusion in a large majority district, thereby submerging the minority vote in the majority district. *Gingles v. Edmisten*, 590 F. Supp. 345, 349 (E.D.N.C. 1984), *aff’d sub nom. Thornburg*, 478 U.S. at 30.

voters, there is another provision of the Voting Rights Act which has vitalized the federal government's role in monitoring state governments' regulation of the election process, including the redistricting process: Section 5 of the Voting Rights Act.<sup>60</sup>

Section 2 applies to all jurisdictions by prohibiting states or political subdivisions from imposing any voting practice or procedure that dilutes the voting strength of racial and ethnic minorities, regardless of intent to discriminate. Section 5, however, applies only to specified jurisdictions, requiring them to be precleared by either the Department of Justice (DOJ) or the United States District Court for the District of Columbia, by showing that any election practice or procedure affecting them does not have the purpose or effect of denying or abridging the right to vote of a racial or ethnic minority group.<sup>61</sup>

In addition to voting strength equality and minority vote dilution considerations, the Federal Constitution also makes political gerrymandering a justiciable issue.<sup>62</sup> Thus, if a redistricting plan, by arbitrarily arranging district boundaries so as to give undue advantage to one political group over another, thereby preventing the adversely affected group from improving its standing in elections, consigns that group to minority status during the life of the redistricting plan, or provides that group with little or no chance of improving its position at the next redistricting, that plan is subject to legal challenge.<sup>63</sup> Other factors recognized by the United States Supreme Court

60. 42 U.S.C. § 1973c (1988).

61. Since redistricting is a voting procedure which must be precleared as to covered jurisdictions, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), the redistricting plans for state legislative seats are required to pass the preclearance procedure before they can become effective in those covered jurisdictions. Five Florida counties—Collier, Hardee, Hendry, Hillsborough and Monroe—were included in 1975 amendments to the Act as covered jurisdictions because of their use of English-only election materials that discriminated against voters with a dominant language other than English. A redistricting plan must be precleared as to these five counties only. Other changes include, but are not limited to: (1) any change in qualifications or eligibility for voting; (2) changes concerning registration; (3) changes involving the use of a language other than English in any aspect of the electoral process; (4) changes in the boundaries of voting precincts or in the location of polling places; (5) changes in the boundaries of a voting unit (through redistricting, annexation, incorporation, reapportionment, changing to at-large elections from district elections or vice-versa); (6) changes in the method of determining the outcome of an election; (7) changes affecting the eligibility of persons to become or remain a candidate; and (8) changes in the eligibility and qualification for independent candidates. See 28 C.F.R. § 51.13 (1992).

62. See *Davis v. Bandemer*, 478 U.S. 109, 119 (1986).

63. A plan that purports to save as many incumbents of a political party as possible at the expense of opposing party candidates is susceptible to a charge of political gerry-

as legitimate considerations in the redistricting process include respecting local boundaries, making districts compact, preserving the cores of existing districts by not unnecessarily dividing them, and avoiding contests between incumbents.<sup>64</sup> Compactness generally refers to districts that are regular in shape, having no unnecessary bulges or protrusions. The emphasis on compactness is on eliminating distance variations for constituents and candidates. These principles are not found in the state or Federal Constitution;<sup>65</sup> however, they are important, along with the other redistricting principles, because they may serve to defeat a claim that a district has been racially gerrymandered.<sup>66</sup> Implicit in the application of these time-tested principles of redistricting is the view that those who are contained within a district share a commonality of ideas and beliefs, and that any plan that may disrupt this putative cohesiveness, such as splitting boundaries or pitting incumbents against one another, is to be treated with skepticism.

## 2. Procedural Requirements

The Florida Constitution contemplates that redistricting will be accomplished by joint resolution by the end of the regular legislative session.<sup>67</sup> This happened only once, however, in 1972. Under the constitutional scheme, if a plan is adopted by the end of the regular session, the Attorney General of Florida then has fifteen days to petition the supreme court for a declaratory judgment ruling on the validity of the plan.<sup>68</sup> The supreme court then has up to thirty days to both permit adversary interests to submit their views and to enter its judgment.<sup>69</sup> If the court disapproves the plan adopted during the regular session, the Governor has up to five days to convene by proclamation an extraordinary session of the Legislature,

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mandering. The evidentiary burden, however, is the high intent standard of the Fourteenth Amendment's Equal Protection Clause.

64. See *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The desire to protect incumbents, however, must not take precedence over the voting potential of a protected minority group. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

65. See *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973).

66. See *Karcher*, 462 U.S. at 725.

67. FLA. CONST. art. III, § 16(a).

68. *Id.* § 16(c).

69. *Id.* If approved, the plan becomes law, "binding upon all the citizens of the state," *id.* § 16(d), subject to review by the United States Attorney General under § 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c (1975), which requires preclearance as described above, and subject to the court's retained jurisdiction.

which has up to fifteen days to adopt a valid plan.<sup>70</sup> If a plan is adopted, the Attorney General has fifteen days to submit it to the court, which has thirty days to permit adversary interests to present their views and to enter its judgment.<sup>71</sup> If the plan is disapproved following an extraordinary session, the court has sixty days from the submission by the Attorney General to draw up a plan.<sup>72</sup> If no plan is adopted by the Legislature during the extraordinary apportionment session, the Attorney General has fifteen days to so inform the court,<sup>73</sup> which then has sixty days to draw up its own plan.<sup>74</sup>

If the Legislature is unable to adopt a redistricting plan during its regular session, the Governor has thirty days to convene a special apportionment session by proclamation, giving the Legislature an additional thirty days to adopt a plan.<sup>75</sup> If no plan is adopted, the Attorney General has five days from adjournment of that session to inform the court, which then has sixty days to adopt its own plan.<sup>76</sup>

Thus, while the Legislature is given the first opportunity to establish a redistricting plan, there are three instances in which the supreme court may exercise this power: (1) when the Legislature fails to adopt a plan by the end of a special apportionment session; (2) when the Legislature fails to adopt a plan by the end of the extraordinary apportionment session; and (3) when the court invalidates the legislative joint resolution adopted during an extraordinary apportionment session.<sup>77</sup>

### III. THE CONSTITUTION IN OPERATION

#### A. 1972

The first opportunity for article III, section 16's operation took place

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70. FLA. CONST. art. III, § 16(d).

71. *Id.* § 16(e).

72. *Id.* § 16(f).

73. *Id.* § 16(e).

74. *Id.* § 16(f).

75. FLA. CONST. art. III, § 16(a). This 30-day period cannot be limited by the Governor, who may use his discretion only in deciding when this special session will begin, which must be within 30 days after adjournment of the regular session. *Florida Senate v. Graham*, 412 So. 2d 360 (Fla. 1982). Only apportionment may be considered during this special apportionment session. FLA. CONST. art. III, § 16(a).

76. *Id.* § 16(b).

77. 25A FLA. STAT. ANN. 672 (West 1991) (annot. to FLA. CONST. art III, § 16).



in 1972 when the Attorney General petitioned the Florida Supreme Court for a declaratory judgment to determine the validity of a joint legislative resolution adopted during the regular session. In *In re Apportionment Law Appearing as Senate Joint Resolution No. 1305, 1972 Regular Session*,<sup>78</sup> the court held that its review of an apportionment plan is limited to facial validity only,<sup>79</sup> and declared both that legislative reapportionment is primarily a matter for the Legislature,<sup>80</sup> and that “[j]udicial relief becomes appropriate only when a legislature fails to act according to federal and state constitutional requisites.”<sup>81</sup> The court was called upon to address the integrity of traditional boundary lines, population deviations and multi-member districts—matters not found in the constitutional provision itself. The court held that there is no requirement for legislative district lines to follow county or precinct lines; the only requirement is that districts be either “contiguous, overlapping or identical territory.”<sup>82</sup>

As to population deviations, the court said:

The Constitutions of Florida and the United States require that one man’s vote in a district be worth as much as another. Mathematical exactness is not an absolute requirement in state apportionment plans; however, deviations, when unavoidable, must be de minimis. Whether a deviation is de minimis must be determined on the facts of each case.<sup>83</sup>

The court noted that the total deviation for the House of Representatives was 0.30% while that of the Senate was 1.15%.<sup>84</sup> The issue of minority representation was addressed in connection with the legislative decision to combine single- and multi-member districts in the redistricting plan.

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78. 263 So. 2d 797 (Fla. 1972).

79. *Id.* at 808.

80. *Id.*

81. *Id.* at 800.

82. *Id.* at 801. Contiguity was not discussed during the 1972 process. It was not until 1982 that the court first addressed contiguity.

83. *In re Apportionment Law Appearing as Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d at 802.

84. *Id.* As previously noted, to determine population deviation for legislative redistricting, it is first necessary to establish each district’s ideal population. This is done by dividing the total state population according to the official census by 40 (Senate) and 120 (House), respectively. The deviation is the difference between the ideal population and a district’s actual population; the range of deviation is the difference between the least and most populous districts.

On multi-member districts, the court, after considering both article III, section 16(a) and article III, section 1, which provides for the election of one senator from each senatorial district and one representative from each house district, held:

Construing these two sections together, the Constitution requires that there be one senator elected from each Senatorial district and one member of the House of Representatives elected from each representative district. This, standing alone, would require single-member districts. However, the Constitution further provides that districts may be "identical territory." This means that multi-members of the Senate or the House of Representatives may be elected from identical territory if such territory were designated as constituting several districts.<sup>85</sup>

Thus, the court concluded that multi-member districts are permissible and may co-exist in the same plan with single-member districts. The court found that the plan which divided Florida into 120 house districts of which twenty-one were single-member, ten were two-member, nine were three-member, twenty were four-member, thirty were five-member and thirty were six-member; and into forty senate districts, of which five were single-member, fourteen were two-member, and twenty-one were three-member, was reasonable and did not violate federal constitutional equal protection requirements.<sup>86</sup> The supreme court's 1972 decision did not end the matter, for in its opinion, it set its precedent for retaining jurisdiction to permit challengers to question the validity of the plan by presenting specific factual objections to it.

The Constitution Revision Commission's desire to avoid proliferating redistricting litigation was short-lived, as four supplemental proceedings were filed with the supreme court, and a separate lawsuit was filed in federal court in Jacksonville. Soon after the supreme court acted, suit was filed in federal court both by plaintiffs who appeared before the supreme

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85. *Id.* at 806-07. The court, in addressing claims of unreasonableness of classifications of single-member and multi-member districts, said it "is not at liberty to declare the . . . plan void because it allegedly creates inconvenience, is unfair, or is inequitable, in the absence of a violation of some provision of the constitution." *Id.* at 807. Multi-member districts are those from which more than one legislator is elected to represent the area. Single-member districts are those from which only one legislator is elected. The latter is the more common; Florida's Legislature is made up of single-member districts.

86. The state court did not address the United States Supreme Court's jaundiced view of multi-member districting plans, namely that they generally pose greater threats to minority-voter participation than do single-member districts. *See Burns v. Richardson*, 384 U.S. 73, 88 (1966).

court and others who did not, claiming that portions of the redistricting plan created impermissible racial and political gerrymandering.<sup>87</sup> The federal court, after dismissing plaintiffs who appeared in the supreme court for impermissibly seeking to appeal a decision from the state's highest court, found that the remaining plaintiffs, claiming a one person, one vote violation, failed to meet the high evidentiary burden of intentional discrimination, proof of discriminatory effect on and actual prejudice to identifiable racial or political segments of voters, or racial gerrymandering.<sup>88</sup> A year later, the supreme court held that the legislative plan was not shown to be unconstitutional in its implementation on a claim that it deprived citizens of Lee County of meaningful senatorial representation by the fact that no candidate from that county entered any of the primary elections for seats in the senate in any of the four districts which cut across Lee County lines.<sup>89</sup> In another proceeding, the supreme court rejected a claim that the redistricting plan left voters in Neptune Beach and Jacksonville Beach without an effective voice because the plan did not join these two communities. The court concluded that the plan did not leave Neptune Beach officials without any effective voice in the Legislature, even though the plan assigned the area to senate districts which did not include the consolidated city of Jacksonville.<sup>90</sup> These two cases involved local interests desirous of obtaining a broader political power base through enhanced representation.

Several years after the 1972 redistricting process, the growing influence of minorities manifested itself in redistricting challenges before the Florida Supreme Court. In 1977, the court rejected claims by Dade County Hispanics that their voting strength had been negated because of the large influx of Hispanics into that area of the state, coupled with the fact that the petitioners resided in multi-member districts. A bare majority of the court held that it did not intend to retain jurisdiction over the 1972 plan in order to continuously monitor changing racial, ethnic or population patterns.<sup>91</sup> Finally, in a case that began in 1977 and concluded in 1980, the court rejected a constitutional challenge to the multi-member house districts in Pinellas County, Florida.<sup>92</sup> However, the court appointed a commissioner to take evidence on the claim that the multi-member district constitutionally impaired the voting strength of the racial or political composition of Pinellas

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87. *Wolfson v. Nearing*, 346 F. Supp. 799 (M.D. Fla. 1972).

88. *Id.* at 804.

89. *In re Tohari*, 279 So. 2d 14 (Fla. 1973).

90. *Futch v. Stone*, 281 So. 2d 484 (Fla. 1973).

91. *Cardenas v. Smathers*, 351 So. 2d 21 (Fla. 1977).

92. *Milton v. Smathers*, 351 So. 2d 24 (Fla. 1977).

County. The commissioner's findings were reported to the court in 1980, and the court denied relief.<sup>93</sup>

## B. 1982

The 1982 Legislature, reflecting on a history of litigation characterizing the redistricting process, approached its mandate from the standpoint of an openness not previously seen in Florida.<sup>94</sup> A House Select Committee on Reapportionment was formed in 1980 to analyze case law on the subject and Section 5 of the Voting Rights Act. Section 5 requires federal preclearance, or approval, of any plan that of necessity involves five of Florida's sixty-seven counties, as a result of amendments adopted after the 1972 redistricting.<sup>95</sup> This Select Committee conducted twenty-one public hearings throughout the state from August to October, 1981.<sup>96</sup> It considered detailed population data, the dynamics of population growth particularly with respect to minorities, and all criteria applicable to the process.<sup>97</sup> Additionally, the Select Committee actually sought and received interest group input.<sup>98</sup> The Legislature adopted the plan on April 7, 1982;<sup>99</sup> five days later, the Attorney General submitted his petition.<sup>100</sup> One month later, the supreme court approved the plan.<sup>101</sup> The plan was then submitted to the Department of Justice for preclearance, which was received by the state on August 5, 1982.<sup>102</sup>

The 1982 redistricting effort is noted for five precedent-setting actions.

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93. *Milton v. Smathers*, 389 So. 2d 978 (Fla. 1980). After conducting fact-finding proceedings, the commissioner found that the multi-member districts did not unconstitutionally impair the voting strength of the district's Black population. The supreme court's decision was based on the absence of evidence of intent to discriminate—the critical element in proving a fourteenth amendment violation. Indeed, all of the cases based on the 1972 redistricting process were reviewed under this "intent to discriminate" standard. As shown below, a change in this standard of proof coupled with United States Supreme Court and Department of Justice involvement, paved the way for further and more intensive litigation culminating in the 1992 experience.

94. Mark Herron, *An Overview of Florida's 1982 Reapportionment*, FLORIDA ENVIRONMENTAL AND URBAN ISSUES, Oct. 1982, at 5.

95. *Id.* at 6.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See* Herron, *supra* note 94, at 5.

100. *Id.*

101. *Id.* at 20.

102. *Id.*

First, the Legislature had to convene a special session to accomplish its constitutional mandate. Second, the Legislature opted for single-member districts for all forty Senate seats and all 120 House seats, adopting a recommendation made by the 1978 Constitution Revision Commission.<sup>103</sup> The purpose of this shift was to lessen the prospects that minority groups' voting strength would be negated as a result of the winner-take-all nature of multi-member district elections.<sup>104</sup> Third, the Select Committee defined "contiguity."<sup>105</sup> Fourth, detailed consideration was given to representation for the Hispanic and Black population with de minimis population deviation.<sup>106</sup> Finally, a redistricting plan had to be submitted to the DOJ for preclearance under Section 5 of the Voting Rights Act of 1965, as amended, directed to the five counties brought under the law in 1975.<sup>107</sup>

The Florida Supreme Court considered a contiguity challenge to one house district in which challengers contended one portion was only touching another portion and the constitution requires more.<sup>108</sup> The court rejected this challenge, holding that while lands mutually touching only at a common corner or right angle are not contiguous, a district in which no part is isolated from another by an intervening district is contiguous.<sup>109</sup>

The House plan provided seven districts with Hispanic population of fifty-eight percent or higher and seven districts with Black population of fifty-two percent or higher.<sup>110</sup> The Senate plan had one district with a Black population of sixty-five percent and two districts with Hispanic population of fifty-five percent or higher.<sup>111</sup> The total deviation in population among senate and house districts was 1.05% and 0.46%,

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103. FLA. CONST. art. XI, § 2(a) provides for the creation of a constitution revision commission 10 years after the adopting of the 1968 Constitution, and every 20 years thereafter.

104. See *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, Special Apportionment Session, 414 So. 2d 1040, 1045 (Fla. 1982).

105. *Id.* at 1051.

106. See Herron, *supra* note 94, at 7.

107. *Id.*

108. *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, Special Apportionment Session, 414 So. 2d at 1051.

109. *Id.* "Contiguous" means sharing a common boundary for a reasonable distance; "overlapping" means that some parts of the districts are shared; "identical" applies when districts follow the same lines, as in the case of multi-member districts where a house and senate district may have the same lines or boundaries. *Id.*

110. *Id.* at 1045.

111. *Id.*

respectively.<sup>112</sup> The plan for senate districts maintained the boundary line integrity of forty-five counties by not splitting them; the plan for house districts maintained the integrity of twenty-six counties.<sup>113</sup> In most instances, county lines were split because population was greater than the ideal number of people per district.<sup>114</sup>

The Florida Supreme Court found no proof of purposeful discrimination.<sup>115</sup> The court rejected claims that a district in Dade County had been gerrymandered to the detriment of the Hispanic population, and that in Dade County, districts should be redrawn to provide for a larger concentration of Black voters.<sup>116</sup> The court recognized that challenges are cognizable under the Fourteenth Amendment even though districts may be relatively equal in population.<sup>117</sup> However, in citing to United States Supreme Court cases decided after the 1972 Florida Supreme Court decision validating the 1972 redistricting plan, the court said:

We consider any minority challenge to the plan as raising an issue of whether it invidiously discriminates against any minority group. To show invidious discrimination, the objector to the plan for apportionment must produce evidence which supports the finding that the political process in this apportionment plan was a "purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" The objectors have the burden to show this Court that the plan was motivated by an intent to discriminate.<sup>118</sup>

The court concluded that the plan before it did "not invidiously discriminate against any racial or language minority for the purpose of minimizing or canceling the voting strength of either the Black or Hispanic population in violation of either the Fourteenth or Fifteenth Amendments,

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112. *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, Special Apportionment Session*, 414 So. 2d at 1044.

113. *Id.* at 1045.

114. *Id.*

115. *Id.* at 1052.

116. *Id.*

117. *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, Special Apportionment Session*, 414 So. 2d at 1052.

118. *Id.* (citations omitted). The court also decided that senators' four-year terms should be truncated, there could be no "holdover" terms, and senators were required to run if, as a result of redistricting, there is a change in district lines and constituency. *Id.* at 1047-48.

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In contrast to 1972, the openness of the 1982 process and the decision to use single-member districts only (coupled with the high evidentiary burden necessary to prove a constitutional violation), contributed to the least contentious redistricting process in Florida's modern history.<sup>120</sup> The relative ease by which 1982 redistricting was accomplished and the lack of any federal and supplemental state judicial activity is in stark contrast to what transpired in 1992.<sup>121</sup>

### C. 1992

The 1992 redistricting process was the end product of an unprecedented population growth and a fundamental change in federal voting rights laws. These two factors clashed with the state's traditional one-party domination of Florida government to produce the most intense legislative district realignment in the state's history, dominated by racial and ethnic minority group efforts to secure a greater piece of the state's political power pie.

According to the 1990 census, the state's population increased during the last decade by more than thirty percent, to just under thirteen million, from a previous 9.7 million.<sup>122</sup> A substantial portion of this phenomenal growth resulted from the immigration of Hispanics from Central and South America. Nowhere was this growth more evident than in heavily populated Dade County. As the number of Hispanics mushroomed, they became increasingly active both civically and politically in their new community. They registered, voted, campaigned for, sought and won election to office as Republicans in what was historically a firmly entrenched Democratic Party stronghold.

The second significant change involved the amendments to the Voting Rights Act of 1965.<sup>123</sup> The amendments altered the method by which a minority group could show a voting practice or procedure, including a redistricting plan, thereby violating its right to fair and equal participation

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119. *Id.* at 1052 (citing *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *McGowan v. Maryland*, 366 U.S. 420 (1961)).

120. Critics accused the 1972 Legislature leadership of adopting a "secret plan." Herron, *supra* note 94, at 6-7.

121. As in 1972, the supreme court retained exclusive state jurisdiction to consider challenges to the 1982 plan. *In re Apportionment Law Appearing as Senate Joint Resolution 1 E, Special Apportionment Session*, 414 So. 2d at 1052.

122. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 289 (Fla. 1992).

123. *Id.* at 280.

in the electoral process.<sup>124</sup> As noted above, this change in the legal standard took place at a time of rapid increase in the Hispanic population, particularly in the multicultural population-intense counties of Dade and Hillsborough. These factors, coupled with the rise of the Republican Party in what was traditionally a one-party state, and the enhanced overall consciousness of minority rights generally, set the stage for 1992's redistricting efforts dominated by politics, race and ethnicity.

The battle lines for the 1992 redistricting effort were drawn along political, racial and ethnic lines toward a common goal: the exercise of political power and influence. In addition to the clamor for access to and exercise of political power during this most contentious redistricting cycle, underlying tensions surfaced between Blacks and Hispanics, particularly in Dade County.<sup>125</sup>

Legislative leaders anticipated heightened activity, particularly by minorities during the 1992 legislative session. Reflecting on the 1982 experience, the leaders began preparing for the session four years earlier. The House and Senate each hired separate expert technical staffs and provided them with state-of-the-art computer systems. Reapportionment committees were appointed in 1991 for the House and Senate, and both chambers hosted thirty-two public hearings throughout the state between September and December, 1991. The purpose of the hearings was to provide for unfettered citizen involvement in the development of a constitutional redistricting plan, and to educate the public on the subject and its process.<sup>126</sup>

On January 14, the first day of the 1992 Florida legislative session, Miguel DeGrandy filed a lawsuit in federal court challenging the constitutionality of Florida's then-existing congressional and state legislative districts.<sup>127</sup> DeGrandy, a Republican member of the Florida House of Representatives from Dade County, joined with party leaders, other Republican legislators and voters, in naming as defendants the Speaker of the House of Representatives, T. K. Wetherell, the President of the Florida Senate,

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124. *Id.*

125. In *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1481 (11th Cir. 1993), involving a Voting Rights Act claim that the at-large county commission election districts dilute the voting strength of Blacks and Hispanics, the appeals court found that a district court's finding of a "keen hostility" between Blacks and Hispanics in Dade County is not clearly erroneous.

126. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 278.

127. *DeGrandy v. Wetherell*, 815 F. Supp. 1550, 1554 (N.D. Fla. 1992).



Gwen Margolis, the Governor, Attorney General, and Secretary of State.<sup>128</sup> The Complaint alleged that the then-existing congressional and state districts violated both the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution and the Voting Rights Act of 1965, as amended.<sup>129</sup>

After preliminary procedural skirmishes, DeGrandy filed a Second Amended Complaint on March 9th<sup>130</sup> further alleging that the then-existing congressional and legislative districts violated Article I, Section 2 of the United States Constitution and the "one-person, one-vote" principle, and that since the former districts diluted the voting strength of minority voters, they violated the Voting Rights Act of 1965, as amended.<sup>131</sup> DeGrandy also alleged that the Florida Legislature was at an impasse and therefore unable to act; that the time frame for redistricting set forth in the Florida Constitution, article III, section 16, in light of the preclearance requirements of Section 5 of the Voting Rights Act, would not provide for sufficient time to adopt a valid redistricting plan for the State Legislature and that therefore this provision was unconstitutional;<sup>132</sup> and that the democratic leadership, the Speaker of the House, President of the Senate, and Governor, "intentionally misused the time lines and procedures found in Article III . . . to delay the redistricting process to the advantage of white (democratic) incumbents and to the detriment of voters and would-be challengers to those incumbents."<sup>133</sup>

On March 13, the Florida Legislature adjourned its regular session without adopting a state redistricting plan.<sup>134</sup> Two weeks later, the federal court established an expedited schedule for adoption of both congressional and state legislative plans by May 29.<sup>135</sup> However, the court's order did not prohibit state officials from attempting to enact a redistricting plan.<sup>136</sup> On April 2, the Governor called a special redistricting and apportionment session of the Florida Legislature pursuant to article III, section 16(a) of the Florida Constitution. Eight days later, the Legislature adopted Senate Joint Resolution 2G redistricting both houses of the Legislature.<sup>137</sup>

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128. *Id.*

129. *Id.*

130. *Id.* Specific dates are included here to demonstrate the intensity of the litigation.

131. *Id.*

132. *DeGrandy*, 815 F. Supp. at 1554. The federal court never ruled on this claim.

133. *Id.* at 1555.

134. *Id.*

135. *Id.*

136. *Id.*

137. *DeGrandy*, 815 F. Supp. at 1555.

Four days before the Legislature adopted a redistricting plan, the federal court appointed a special master.<sup>138</sup> On April 7, the court consolidated the *DeGrandy* case with a similar lawsuit filed by the Florida State Conference of the NAACP Branches and other individual African-American voters.<sup>139</sup> The court also granted other persons and entities leave to intervene or act as *amicus curiae*.<sup>140</sup>

On April 17, the Florida Attorney General submitted Senate Joint Resolution 2G to the DOJ for preclearance pursuant to Section 5 of the Voting Rights Act.<sup>141</sup> That same day, the three-judge federal court ordered bifurcated hearings on congressional redistricting and state redistricting plans.<sup>142</sup> Meanwhile, three days after the April 10 legislative adoption of Senate Joint Resolution 2G, the Florida Attorney General petitioned the Florida Supreme Court for a declaratory judgment determining the validity of the joint resolution.<sup>143</sup> Before the supreme court, the proponents of the senate joint resolution contended that because the court's analysis is directed solely to facial constitutional validity of the legislation, the court could not address the complex evidentiary standard imposed on those who challenge a redistricting plan under the Voting Rights Act.<sup>144</sup>

Opponents of the senate joint resolution, also the intervenors to the federal court litigation, contended that the supreme court could not fulfill its duty without conducting a time-consuming analysis under the Voting Rights Act—an impossible burden in light of time constraints on campaigning and elections.<sup>145</sup> The opponents further requested that the court declare the joint resolution facially invalid.<sup>146</sup> They also argued that the court should

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *DeGrandy*, 815 F. Supp. at 1555. The adoption of a congressional redistricting plan is accomplished in the same manner as the adoption of any piece of Legislation—approval by both houses of the Legislature and subject to gubernatorial veto. In 1992, the Legislature was unable to adopt a congressional redistricting plan; therefore, the federal court undertook the task and appointed a special master, who presided over a trial and prepared a report. After receiving the special master's report on congressional redistricting, and conducting hearings on his findings and conclusions, the federal court, on May 29, issued its judgment adopting a congressional redistricting plan. *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1081 (N.D. Fla. 1992).

143. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 278.

144. *Id.* at 281-82.

145. *Id.* at 282.

146. *Id.*

disregard the thirty-day requirement of the Florida Constitution redistricting provision and refer the case to a judge or master to conduct the necessary fact-finding analysis contemplated by the Voting Rights Act or withhold ruling and defer to the federal court action.<sup>147</sup>

The supreme court rejected the view that it could not conduct a Voting Rights Act analysis in evaluating the validity of the plan.<sup>148</sup> The court, while recognizing the impossibility of conducting "the complete factual analysis contemplated by the Voting Rights Act . . . ,"<sup>149</sup> nevertheless analyzed all of the statistical data filed by the parties. This data included the breakdown of White, Black, and Hispanic voting-age populations and voting registrations.<sup>150</sup> The court then analyzed numerous legislative districts contained in Senate Joint Resolution 2G, particularly Hispanic and Black majority districts, and concluded that the plan was valid.<sup>151</sup> However, as in the past, the court retained exclusive jurisdiction to provide "any interested person . . . the opportunity to attempt to prove that the Joint Resolution is invalid through a presentation of evidence in accordance with the *Gingles* analysis of the Voting Rights Act."<sup>152</sup> Should such an opportunity be sought, the court provided "for an expedited disposition through the appointment of a commissioner to make findings of fact."<sup>153</sup> The supreme court's validation of the plan took place over a vigorous dissent by Chief Justice Shaw, who found the redistricting plan invalid under the Voting Rights Act.<sup>154</sup>

When considering total population, the legislatively adopted plan included thirteen Black majority population house districts and three Black influence districts in which minority population exceeded twenty-five percent but was less than fifty percent.<sup>155</sup> The plan also provided for two Black majority population senate districts (both in Dade County) and three

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147. *Id.*

148. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 282.

149. *Id.*

150. *Id.*

151. *Id.* at 285.

152. *Id.*

153. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 286. This is what the supreme court did in *Milton v. Smathers*, 351 So. 2d 24 (Fla. 1977).

154. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 287-93 (much of Chief Justice Shaw's analysis is found in the federal court's decision).

155. *Id.* at 282.

Black influence districts with minority population ranging from twenty-eight percent to forty-nine percent.<sup>156</sup> With regard to Hispanic representation, the court noted that the plan provided for nine majority house districts and seven influence districts, the latter ranging in population from twenty-six percent to forty-six percent.<sup>157</sup> The plan created three Hispanic majority senate districts.<sup>158</sup> When voting-age population is considered, the joint resolution provided for eleven Black majority and two influence districts in the House, and two majority and one influence district in the Senate.<sup>159</sup>

The court noted that the 1982 plan contained seven Black house districts, seven majority Hispanic districts, "only 1" Black majority senate district and "only 2" Hispanic majority senate districts.<sup>160</sup> The court observed that the 1992 plan was accomplished with maximum population deviations of 1.99 percent in the house districts and 0.87 percent in the senate districts, and thus concluded "[t]he 1992 plan is a material improvement over conditions under the 1982 plan . . . and provides a substantial opportunity for minorities to influence elections and elect representatives of their choice."<sup>161</sup>

These findings did not satisfy the objectors, however, who, although given the opportunity to press their specific voting rights claims before the supreme court,<sup>162</sup> never did. Instead, the objectors engaged in unsuccessful efforts to remove the supreme court proceedings to federal court and thereby ousted the supreme court of its jurisdiction.<sup>163</sup> The parties returned to the supreme court only to address the Section 5 objection by the Justice Department. The objectors to the joint resolution wanted to wage their fight in federal court to create more minority districts.<sup>164</sup>

The Florida Supreme Court also had occasion to address contiguity for

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156. *Id.* at 283. An influence district is one in which a minority, while it may not be able to elect a candidate outright, nevertheless has a sizeable enough population to influence the outcome of the election, when the minority vote is added to the non-minority crossover vote. *Id.* at 282-83 n.8.

157. *Id.* at 283.

158. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 283.

159. *Id.* at 282-83.

160. *Id.* at 284.

161. *Id.* at 285.

162. *Id.* at 285-86.

163. *DeGrandy Plaintiffs' Petition for Removal*, *DeGrandy*, 815 F. Supp. at 1550.

164. As demonstrated by the voluminous filings in *DeGrandy*, 815 F. Supp. at 1550.

the second time.<sup>165</sup> Four senate districts were challenged because, as a result of the lack of roads or the presence of bodies of water without connecting bridges, travel throughout these four districts could not be accomplished without crossing into another district.<sup>166</sup> The court held that these districts are contiguous because “[c]ontiguity does not impose a requirement of a paved, dry road connecting all parts of a district.”<sup>167</sup>

The supreme court’s decision was issued on May 13. On May 27, the federal court held a hearing on all pending motions, including those designed to set trial on legislative redistricting, as well as those designed to secure the federal court’s deference to the state legislative and judicial review process.<sup>168</sup> At that hearing, the federal court learned from the DOJ that it probably would issue its preclearance decision by June 17, 1992.<sup>169</sup>

On June 16, the DOJ issued its preclearance decision, emphasizing that its Section 5 review addressed the plans only insofar as the five preclearance counties (Collier, Hardee, Hendry, Hillsborough and Monroe) were affected.<sup>170</sup> The Attorney General of the United States did not interpose any objections to the redistricting plan for the House of Representatives.<sup>171</sup> The DOJ, however, refused to preclear the Senate Plan stating:

With regard to the Hillsborough County area, the state has chosen to draw its senatorial districts such that there are no districts in which minority persons constitute a majority of the voting age population. To accomplish this result, the state chose to divide the politically cohesive minority populations in the Tampa and St. Petersburg areas. Alternative plans were presented to the legislature uniting the Tampa and St. Petersburg minority populations in order to provide minority voters an effective opportunity to elect their preferred candidate to the State Senate. . . . [T]he information before us, including the economic and other ties between Tampa and St. Petersburg, as well as the political cohesiveness of minority voters in those two cities, demonstrates that the two areas do share a commonality of interest. Finally, we have examined evidence, including evidence in the legislative record, which suggests that the state’s approach to senatorial redistricting in the

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165. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 279.

166. *Id.*

167. *Id.*

168. *DeGrandy*, 815 F. Supp. at 1555.

169. *Id.*

170. *Id.* at 1556.

171. *Id.*

Hillsborough area was undertaken with an intent to protect incumbents. Such a rationale, of course, cannot justify the treatment of minority voters in this area by the State Senate plan.<sup>172</sup>

At the request of the Attorney General of Florida, the supreme court set an expedited schedule to address the Justice Department's objections to the Senate plan.<sup>173</sup> In its order of June 17, 1992, the supreme court encouraged the Legislature to adopt a proper plan, taking into consideration the Justice Department objections.<sup>174</sup> The supreme court cautioned that if the Legislature declared its inability to adopt a plan, or failed to adopt a plan by June 24, 1992, the court would conclude that the Legislature is at an impasse, upon which the court would accomplish the task.<sup>175</sup> The supreme court also set out an abbreviated schedule within which redistricting action had to be taken.<sup>176</sup> On the following day, House Speaker Wetherell and Senate President Margolis informed the supreme court of their decision not to convene their respective chambers in an extraordinary apportionment session.<sup>177</sup> The court was also informed that the Governor did not intend to convene the Legislature.<sup>178</sup> As a result, the supreme court declared a legislative impasse and adopted an amended schedule.<sup>179</sup>

Meanwhile, plaintiffs in the federal court action, upon notice of the DOJ's refusal to preclear the Senate plan, immediately asked that forum to establish a scheduling order and set the matter for trial on legislative redistricting, and filed yet another Amended Complaint contending that the joint resolution itself violated Section 2 of the Voting Rights Act.<sup>180</sup> Thus, rather than litigating Section 2 claims in the supreme court pursuant to its retained jurisdiction, objectors to the plan opted for federal court involvement.

Challengers to the plan raised jurisdictional questions both in the supreme court and federal court.<sup>181</sup> The Florida Supreme Court, address-

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172. *Id.* (quoting letter from John Dunne, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to Robert A. Butterworth, Florida Attorney General (June 16, 1992)).

173. *DeGrandy*, 815 F. Supp. at 1556.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *DeGrandy*, 815 F. Supp. at 1556.

179. *Id.*

180. *Id.* at 1558.

181. *Id.* at 1557.

ing the questions, said:

The reapportionment of state legislative bodies is not a power delegated by the Constitution of the United States to the federal government. Under the provisions of the Tenth Amendment to the United States Constitution, this is a power reserved to states. Of course, this Court is obligated to apply any applicable federal constitutional provisions and any federal statutes implementing these provisions.

The Florida Constitution places upon this Court the responsibility to review state legislative reapportionment. Art. III, § 16, Fla. Const. Pursuant to that authority, we approved the original legislative reapportionment and retained jurisdiction to entertain subsequent objections thereto. Consistent with the provisions of art. III, section 16 of the Florida Constitution, we believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the Legislature has declared that it is not going to do so.<sup>182</sup>

On June 25, the supreme court adopted, as a cure for the portion of the plan rejected by the DOJ, a proposal submitted by certain African-American parties.<sup>183</sup>

Two days before the supreme court issued its curative decision, the DOJ filed its own lawsuit in federal court against the State of Florida and several elected officials,<sup>184</sup> contending that the redistricting plans diluted the voting strength of African-American and Hispanic citizens in several areas of the state in violation of Section 2 of the Voting Rights Act,<sup>185</sup> and that the state's proposed Senate plan for the Hillsborough County area divides the politically cohesive minority population in the Tampa and St. Petersburg areas, such as there are no senatorial districts in which minority persons constitute a majority of the voting age population.<sup>186</sup>

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182. *Id.* (citing *In re Constitutionality of Senate Joint Resolution 2G*, Special Apportionment Session 1992, 601 So. 2d 543, 545 (Fla. 1992)).

183. *DeGrandy*, 815 F. Supp. at 1557 (citing *In re Constitutionality of Senate Joint Resolution 2G*, Special Apportionment Session 1992, 601 So. 2d at 546). The remedial plan selected was the one submitted to the supreme court by the Humphrey-Reaves plaintiffs.

184. *Id.*

185. *Id.* at 1557-58.

186. *Id.* at 1558. The DOJ expressed its view that the supreme court's modification for the Hillsborough County area satisfied its Section 5 objection. However, the Department did not officially preclear the modification decision. Accordingly, the three-judge court adopted the supreme court's modification as its own for Section 5 purposes, thereby precluding the need for Justice Department preclearance. *Id.* *Wise v. Lipscomb*, 437 U.S. 535 (1978),

The DOJ's lawsuit was consolidated with DeGrandy's action.<sup>187</sup> DeGrandy was then permitted to amend his Complaint to allege Section 2 violations as to Senate Joint Resolution 2G as now modified.<sup>188</sup> On June 26, the federal court, one day after the supreme court adopted its remedy for the Justice Department's objection, commenced trial which lasted five days, through July 1. During the trial, the parties entered into a consent decree with respect to the Escambia County portion of the lawsuit by redrawing the Escambia County house districts to provide for greater African-American participation.<sup>189</sup> The agreement on Escambia County was reached after the court ruled from the bench that the plaintiffs established a prima facie case on a constitutional violation of intentional discrimination in Escambia County.<sup>190</sup>

On July 1, after testimony and argument had been concluded, the court ruled from the bench that, with respect to the Senate plan, although the plaintiffs demonstrated that a fourth Hispanic district can be drawn in the Dade County (South Florida) area, they failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon African-American voters in the same area.<sup>191</sup> Therefore, the federal court was required to give deference to the state policy as expressed in the Florida plan, Senate Joint Resolution 2G as modified, and ultimately approved by the supreme court.<sup>192</sup>

With respect to the House plan, the federal court took note that the Senate Joint Resolution created thirteen minority-majority districts of which nine had Hispanic voting-age population supermajority districts and four had African-American voting age population majority districts.<sup>193</sup> The *DeGrandy* plan, as modified during the trial, provided for eleven Hispanic south Florida districts of supermajority proportion, each containing no less than sixty-three percent Hispanic voting age population.<sup>194</sup> The modified *DeGrandy* plan also provided for four African-American districts containing

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holds that a court-adopted plan does not require preclearance by the DOJ under Section 5 of the Voting Rights Act. *Id.* at 540.

187. *DeGrandy*, 815 F. Supp. at 1558.

188. *Id.* at 1559.

189. *Id.* at 1560.

190. *Id.* Only plaintiff-intervenor Daryl Reaves, a member of the State House, was not a party to the Escambia County consent decree. *Id.*

191. *DeGrandy*, 815 F. Supp. at 1560.

192. *Id.*

193. *Id.* at 1580.

194. *Id.* at 1581.



Black voting-age population percentages of no less than fifty-five percent.<sup>195</sup>

The federal court concluded that only the modified DeGrandy plan was acceptable under Section 2 of the Voting Rights Act.<sup>196</sup> By its action, the federal court thus concluded—contrary to the supreme court's view that the joint resolution represented a significant improvement for minorities over 1982—that because four Hispanic senate seats (instead of the Legislature's three) and eleven Hispanic house seats (instead of the Legislature's nine) could have been created for the Dade County area, the state plan *ipso facto* violates Section 2 of the Voting Rights Act, and the modified DeGrandy plan would be used for the 1993 elections.

Immediately thereafter, the government defendants applied for a stay from the United States Supreme Court as to the federal court's decision on the House plan. Upon application to that Court, the federal district court's House plan with respect to Dade County was stayed.<sup>197</sup> Accordingly, when the 1992 elections were held for the Florida Legislature, the plan adopted by the Florida Legislature, as modified and approved by the supreme court, was the plan used for those elections. The three-judge court decision is before the United States Supreme Court in the form of three separate appeals which have been consolidated for briefing, argument and disposition.

In its appeal to the United States Supreme Court, the House of Representatives contends that the federal court's plan constitutes maximization<sup>198</sup> of electoral opportunities in violation of Section 2 of the Voting Rights Act because the legislative plan already provides that minorities have the opportunity to elect candidates in numbers essentially equal to the minorities' percentages of the population. The House further contends that the district court erred by not abstaining and deferring to the state constitutional process, contending that the state supreme court is the proper forum to address redistricting concerns. Finally, the House maintains that the remedy imposed by the court is flawed in that the court relied on erroneous population data by considering Hispanic non-citizens in the voting-age

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195. *Id.* Unlike the joint resolution, the modified *DeGrandy* plan reached beyond Dade County and into neighboring counties. See *DeGrandy*, 815 F. Supp. at 1581.

196. *Id.* at 1582.

197. *Wetherell v. DeGrandy*, 113 S. Ct. 1 (1992) (order of the United States Supreme Court granting stay).

198. Maximization means drawing the greatest, or maximum, number of majority minority districts and that the failure to do so constitutes a Voting Rights Act violation.

population equation.<sup>199</sup>

The *DeGrandy* plaintiffs contend that the federal court erred by not providing a complete remedy once it found a violation of Section 2 with respect to the Senate redistricting plan.<sup>200</sup> The DOJ appeal is essentially similar to that presented by the *DeGrandy* plaintiffs.<sup>201</sup>

A reading of the chronology of events pertaining to legislative redistricting, as contained in the two Florida Supreme Court decisions and the federal district court decision, provides the flavor of political, racial and ethnic battles that overshadowed redistricting during 1992. During the litigation before the two judicial forums, there was much talk about the unusual alliance forged between Blacks and Hispanics, particularly since it was understood among insiders that Hispanics, who generally vote republican in Dade County, were in actuality seeking to sever Black voters from traditional democratic jurisdictions and place them into their own majority districts, thereby giving Hispanic Republicans a greater opportunity to elect Republicans in those now-diluted democrat districts.

Because the primacy of racial and ethnic representation mandated by federal law transcended all of the other factors that inhere to redistricting, district compactness took on an "Alice in Wonderland" reality. Odd-shaped, elongated, snake-like, Rorschach ink-blot district lines drawn to accommodate racial and ethnic population patterns were nevertheless deemed compact because these districts—regardless of shape—represented an identifiable community and constituency.

The vitality of these odd-shaped districts drawn to accommodate minority representation is suspect as a result of the United States Supreme Court's decision in *Shaw v. Reno*.<sup>202</sup> *Shaw* involved the drawing of a redistricting plan for North Carolina by the Legislature in response to a Section 5 objection by the United States Attorney General.<sup>203</sup> White residents challenged a portion of this plan creating a congressional district that, for the most part, was no wider than the Interstate 85 corridor, and drawn to create a black-majority district.<sup>204</sup>

The Court held that the residents stated a justiciable claim under the Equal Protection Clause, holding that "a plaintiff challenging a reapportionment statute under [this clause] may state a claim by alleging that the

199. See House of Representatives Brief, *DeGrandy*, 815 F. Supp. at 1550 (No. 92-519).

200. *DeGrandy v. Johnson*, 113 S. Ct. 2438 (1993).

201. *United States v. Florida*, 113 S. Ct. 2438 (1993).

202. 113 S. Ct. 2816 (1993).

203. *Id.* at 2819.

204. *Id.* at 2820.

legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.”<sup>205</sup> The emphasis of this decision is that traditional notions of compactness will not be sacrificed solely for racial purposes in the absence of “sufficient justification.”<sup>206</sup>

It is risky indeed to attempt to predict the outcome of a case pending before the United States Supreme Court. However, it is evident from the redistricting decisions issued during the 1992-93 term that the Court is protective of the traditional deference accorded the state in the exercise of its redistricting responsibilities,<sup>207</sup> while frowning upon the creation of districts solely for racial purposes.<sup>208</sup>

The most significant issue now before the Court concerns maximization of minority districts.<sup>209</sup> In light of *Shaw v. Reno*, and since the Voting Rights Act specifically provides that there is no right to proportional representation for minority groups,<sup>210</sup> it appears the Court will reject the notion that the Act requires the creation of the maximum number of minority districts, however configured. Race and ethnicity will remain factors to be considered in the redistricting process, along with other traditional considerations (compactness, respecting existing boundaries, etc.); however, race and ethnicity will not be exclusive factors, at least in the absence of a clear showing of a constitutional violation.

The bottom line, however, is that the Voting Rights Act and population dynamics together fired a political power struggle that led to the most divisive redistricting process in Florida’s history. As a result of this divisive

205. *Id.* at 2828.

206. *Id.* at 2826. While the Voting Rights Act will not permit a redistricting plan “so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregat[e] . . . voters on the basis of race.” *Shaw*, 113 S. Ct. at 2826 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). The use of bizarre districting is not precluded by this decision, or Supreme Court precedent. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27 (1971). The Court, in dealing with a long history of state-imposed unconstitutional school discrimination, approved “a frank—and sometimes drastic—gerrymandering of school districts and attendance zones,” resulting in “zones [that] are neither compact nor contiguous; indeed they may be on opposite ends of the city.” *Id.* Thus, it appears the Constitution permits what the Voting Rights Act does not; traditional notions of compactness may be sacrificed to remedy a constitutional violation, but not to remedy a statutory infirmity.

207. *See Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993).

208. *See Shaw*, 113 S. Ct. at 2828.

209. *See DeGrandy*, 815 F. Supp. at 1550.

210. 42 U.S.C. § 1973(e) (1988).

process, proposals were submitted to the Legislature in 1993 by Democrats and Republicans, Blacks and Hispanics alike, to either remove the Legislature entirely from the districting process or otherwise involve another entity in it.

#### IV. A GLIMPSE OF THE FUTURE?

In a concurring opinion in *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*,<sup>211</sup> Justice Ben Overton suggested that a 1978 Constitution Revision Commission proposal calling for the creation of a Reapportionment Commission, and providing for specific redistricting standards be reexamined for placement on the ballot.<sup>212</sup> One legislative proposal submitted in 1993 called for the creation of a commission consisting of seven members, none of whom may be elected public officials, party officers, registered lobbyists or legislative employees. Six would be selected by the chief justice of the supreme court, five of whom must be selected from recommendations made by the chief judge of the five district courts of appeal. Each chief judge would recommend three individuals who met the qualifications set out above. The chief justice would appoint at least one member of each racial or language minority group that comprised ten percent of the population of the state as shown by the most recent federal decennial census.

The chief justice would be authorized to disregard the recommendations if they did not permit such appointments. Within thirty days after the appointments were made, the six commissioners would have to select by majority vote of at least four, a seventh commissioner who would serve as chair. The Commission would be authorized to hold hearings and to take action in accordance with specific reapportionment standards. Once the Commission completed its plan, it would file it with the Secretary of State, and within fifteen days of that filing, the Attorney General would petition the supreme court for its approval. Another proposal called for the creation of a commission to undertake the task in the event the Legislature fails to fulfill its redistricting obligation.

In Florida, as in most states, it is the Legislature that is called upon initially to undertake the redistricting process. The stark reality of this fact is that legislators, with an eye to their political careers, are expected to rise above partisan politics and pragmatic self-survival by fairly and lawfully

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211. 597 So. 2d 276 (Fla. 1992).

212. *Id.* at 286.

redistricting—even at their own expense.

It appears to have taken three redistricting cycles for some of Florida's political leaders (and the people they represent) to address whether it may be asking too much for our legislators to redistrict, as constitutionally required, without concern for political survival. No doubt the suggested shift to a commission is reflective of this political reality. By operation of article XI, section 2 of the Florida Constitution, a constitution revision commission will be established in 1998. Perhaps Florida voters will have a chance to consider at that time whether the current method of redistricting, with its political storm and stress, should give way to an alternative approach.

Whether a commission approach is more appealing in light of the political exigencies involved in the appointment process remains to be seen. The fact of the matter is that the Legislature apparently wants to avoid putting itself and the citizens of the state through another contentious, hostile redistricting process, a process that historically is steeped in litigation.

Perhaps, after more than thirty years of redistricting litigation, representation percentages are such as to provide all citizens with a fair, level playing field where each group has equal opportunity to participate in, and realize the fruits of, the political process. If this is so,<sup>213</sup> then perhaps contentious, protracted litigation will be relegated to history.

## V. CONCLUSION

The history of redistricting litigation in Florida exemplifies the shifting political sands from rural to urban concentration, coupled with rapid Hispanic migration and the rise of minority influence in tandem with a change in federal law protective of minority rights. In hindsight, it was inevitable that, by casting the judiciary into the political thicket of apportionment and redistricting, this most fundamental process in a democratic form of government would become steeped in political power entanglements in which the federal courts would be regarded as the ultimate referee.

The state constitutional process under article III, section 16 of the Florida Constitution was born of, and nurtured by, litigation over the

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213. The Florida Supreme Court specifically found that the redistricting plan afforded minorities fair and substantial political opportunity. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d at 285.

ultimate exercise of political power, predominantly by Blacks and Hispanics seeking a greater voice in the democratic process by resorting to remedies provided by changing federal law. The intensity of the conflict in 1992 led to a bipartisan move to change the present system. Whether change comes about, and whether any change will be for the better, is speculative at best.

If there is a single message to be learned from Florida's redistricting history under its constitution, it is that as the voices of minority groups grow louder, so will their insistence on a correspondingly greater voice in the exercise of political power. The overriding goal is fairness—a level playing field where all participants have a voice, the strength of which is unrestricted by racial or ethnic status alone. Perhaps the most recent litigation experience achieves this laudable end; only the ameliorative effect of time will tell. If, however, this goal remains unattainable in the minds of some, then intensely litigating future redistricting efforts, even to the point of using increased minority group leverage to further a political party's personal agenda, looms on the horizon.

# The History of Florida's State Flag

Robert M. Jarvis\*

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## I. INTRODUCTION

The Florida Constitution requires the state to have an official flag, and places responsibility for its design on the State Legislature.<sup>1</sup> Prior to 1900, a number of different flags served as the state's banner. Since 1900, however, the flag has consisted of a white field,<sup>2</sup> a red saltire,<sup>3</sup> and the

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\* Professor of Law, Nova University. B.A., Northwestern University; J.D., University of Pennsylvania; LL.M., New York University.

1. "The design of the great seal and flag of the state shall be prescribed by law." FLA. CONST. art. II, § 4. Although the constitution mentions only a seal and a flag, the Florida Legislature has designated many other state symbols, including: a state flower (the orange blossom - adopted in 1909); bird (mockingbird - 1927); song ("Old Folks Home" - 1935); tree (sabal palm - 1953); beverage (orange juice - 1967); shell (horse conch - 1969); gem (moonstone - 1970); marine mammal (manatee - 1975); saltwater mammal (dolphin - 1975); freshwater fish (largemouth bass - 1975); saltwater fish (Atlantic sailfish - 1975); stone (agatized coral - 1979); reptile (alligator - 1987); animal (panther - 1982); soil (Mayakka Fine Sand - 1989); and wildflower (coreopsis - 1991). DEL MARTH & MARTHA J. MARTH, FLORIDA ALMANAC 1992-1993 311-13 (9th ed. 1992).

2. The background of a flag is called its field or ground. In describing the field, it is common to divide it into vertical halves known respectively as the hoist and the fly. The hoist is the area closest to the pole or staff from which the flag is being flown, while the fly is the free end of the flag. The field is sometimes further divided into quarters, known as cantons. The upper hoist canton always is the canton that is being referred to unless otherwise noted. WILLIAM CRAMPTON, THE COMPLETE GUIDE TO FLAGS 18 (1989).

3. A saltire is an X-shaped cross. Flags that use crosses employ one of three basic types: a plain cross, in which the arms are of equal length; a Scandinavian cross, in which

state seal.<sup>4</sup>

Although Floridians encounter the flag every day,<sup>5</sup> few know anything about its rich history.<sup>6</sup> Accordingly, this essay provides an overview of the many flags that have flown over Florida.<sup>7</sup>

## II. EUROPEAN DISCOVERY AND CONQUEST

Flags as we think of them today are of relatively recent origin. Although differences of opinion exist, most scholars believe that flags made out of fabric first appeared in China and were in regular use in that country by the fifth century B.C. India, Burma, and Siam also employed fabric flags at an early date.<sup>8</sup> Flags did not become popular in Europe until the Middle Ages, however, and no truly national flag existed before the sixteenth century.<sup>9</sup>

As far as is known, none of the Indian tribes of North America had

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the fly-end arm is longer than the one on the hoist; or a saltire, in which the arms are diagonal. A cross is said to be "couped" if it does not extend across the entire length of the flag; otherwise, it is described as being "throughout." *Id.* at 17.

4. For a description of the state seal, see *infra* notes 97, 98, and 109.

5. By law, the state flag must "be displayed at a suitable place and in the appropriate manner on the grounds of each elementary and secondary public school." FLA. STAT. § 256-.032 (1991). By custom, the state flag is flown on and around government office buildings, courthouses, historical sites, and sporting venues.

6. This is due, at least in part, to the fact that so many Floridians are transplants. It is estimated that two out of every three Floridians were born somewhere else, and nearly 1,000 new residents arrive in Florida every day. MARTH & MARTH, *supra* note 1, at 256-57.

7. A concise summary of the laws regulating the use of the current state flag can be found in 48 FLA. JUR. 2D *State of Florida* § 4 (1984 & 1993 Cum. Supp.).

8. For a detailed discussion of the development of flags, see CRAMPTON, *supra* note 2, at 7-20. As Crampton explains, "Flags began as *vexilloids*, solid objects carried at the top of staffs. They were made of wood, bronze or precious metal, and depicted a god or totem object, or the attribute of a god or guardian spirit." *Id.* at 7. The word vexilloid comes from the Latin word "vexillum," meaning flag, and it is from this root that the words vexillology (the study of flags), vexillologist (a flag historian), vexillophilist (a flag collector), and vexillary (a flag bearer) are derived. See WHITNEY SMITH, *FLAGS THROUGH THE AGES AND ACROSS THE WORLD* 30 (1975) [hereinafter SMITH, *ACROSS THE WORLD*].

9. Because of the prominent role played by the Crusades, most early European flags had a religious connotation. Subsequently, flags began to be used for other purposes, such as to mark one's station in life or affiliation with a particular group or trade guild. Thus, for example, the candlemakers of Bayeux in France used a black flag with three white candles. *Flag*, in 4 THE NEW ENCYCLOPAEDIA BRITANNICA: MICROPAEDIA 811, 812 (15th ed. 1988).



their own flags prior to the twentieth century.<sup>10</sup> Thus, credit for being the first to bring a flag into the Western Hemisphere usually is given to the Vikings for their "Raven" flag.<sup>11</sup> It is thought that this flag, which most probably had a white field and sported a black raven, appeared somewhere in present-day New England in about 1000 A.D.<sup>12</sup>

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10. WHITNEY SMITH, *THE FLAG BOOK OF THE UNITED STATES* 10 (1970) [hereinafter SMITH, *FLAG BOOK*]. Rather than using flags, the tribes employed standards to identify themselves:

The forerunners of flags in America were symbols (standards) used by Indian tribes. Although some tribes were identified by their physical appearance, many had developed standards much like those used in Europe and Asia thousands of years before.

These standards were often a symbol of the tribes' "animal god," which was believed to be watching over them and lending "his" spirit to the members of "his" tribe. These symbols were made of leather, wood, stone and so on, and often decorated with feathers and/or stained in different colors to create a distinctive standard that was placed on a spear or lance. The "flag" was carried by the chief or his emissary during battle and was placed in a conspicuous position during times of peace.

Some Native American tribes also used another type of standard known as the totem pole. Usually a tall wooden carving, sometimes decorated with feathers and stained various colors, a totem was too large to be carried and was, therefore, a stationary standard.

CANDICE M. DEBARR & JACK A. BONKOWSKIE, *SAGA OF THE AMERICAN FLAG: AN ILLUSTRATED HISTORY* 9 (1990). Today, both the Miccosukees and the Seminoles have their own flags. The Miccosukee flag, adopted in 1962, consists of four horizontal stripes. The top stripe is white, followed by stripes of black, red, and yellow. Because the Miccosukees believe that life spins in a circle, beginning in the east and ending in the south, each stripe represents a different compass point: yellow for east, red for north, black for west, and white for south. ALLEN MORRIS, *THE FLORIDA HANDBOOK* 1993-1994 283 (24th ed. 1993).

The Seminole flag was selected in August 1966 during a flag-designing contest held at the tribe's annual powwow. Intended to resemble the current Florida state flag, it has a blue field with the seal of the Seminole tribe in the center. The seal consists of a palm tree, a dugout canoe (representing the business interests of the tribe), and a chickee house and council fire (suggesting the social affairs of the people), and is surrounded by the words "Seminole Tribe of Florida" and "In God We Trust." A red saltire bearing blue-and-white chevrons appears behind the seal. *Id.*

11. Ravens were a traditional Norse symbol for good luck. Arthur E. DuBois & William C. Dwiggins, *Flags*, in 10 COLLIER'S *ENCYCLOPEDIA* 35, 36 (1990).

12. As has been explained elsewhere:

It is generally accepted that the first real flag flown in what would become the United States was a white flag with a black raven on it. Legend tells us this flag was carried by Erik the Red and his son, Leif Eriksson, Viking explorers believed to have landed in the Americas during A.D. 1000.

There are no actual illustrations or consistently accurate written descrip-

After the Vikings, flags were not seen again in the New World until Christopher Columbus traveled to the Americas in 1492 with two different flags. The first was a special expeditionary flag that had been given to him by his Spanish patrons, King Ferdinand V and Queen Isabella. This flag was white and had a green cross flanked by the letters F (for Ferdinand) and Y (for Isabella). Like the cross, both of the letters were green and each was topped with a gold crown.<sup>13</sup>

Columbus' other flag was the royal banner of the Spanish kingdoms of Castile and Leon. Created in 1230 and known as the "Castle and Lion" flag, it had two gold castles, each on a red field, in the upper hoist and lower fly, and two red lions, each on a white field, in the upper fly and lower hoist.<sup>14</sup> Since this flag was used by many early Spanish explorers,<sup>15</sup> most historians believe that Juan Ponce de Leon had it with him when he discovered Florida in 1513.<sup>16</sup>

tions to prove the existence of the Viking flag. However, coins of the early ninth century show a fringed, triangular flag, sometimes with a cross in the field and sometimes with a raven . . .

If the Viking flag (white with a black raven) did exist—and the majority of our historians accept that it did—it is doubtful the flag represented the Vikings as a nation. The Bayeux tapestry, an embroidery made between A.D. 1070 and 1080, shows us that flags were commonly used, but not as national symbols. The Viking flag, therefore, would most likely have been a personal flag of Erik and his son, Leif.

DEBARR & BONKOWSKIE, *supra* note 10, at 9, 11.

13. SMITH, FLAG BOOK, *supra* note 10, at 13.

14. *Id.* at 14.

15. *Id.* ("The most important flag displayed by Columbus and other early Spanish explorers was the royal banner of Castile and Leon which bore the arms of these kingdoms, namely a castle and a lion.").

16. See, e.g., HARRISON S. HERRICK, "THE FLAGS OF THE UNITED STATES:" YOUR FLAG AND MINE 58 (1925) ("Ponce de Leon, a Spanish explorer in search of the Magical Fountain of Perpetual Youth, planted the Royal Banners of Spain in Florida in 1512."). Although Herrick and other historians are confident that Ponce de Leon had the Castle and Lion flag with him, at least one scholar has questioned their assumption:

No mention is made [in contemporary accounts] of any ceremony attendant upon the act of taking possession. The omission of details seems to have been accepted by later writers as an invitation to supply them and this has been done in many elaborate interpretations. The scene of taking possession is usually pictured with Ponce surrounded by priests and soldiers kneeling in prayer amidst the banners of the Church and state, with an audience of interested Indians in the background. . . . These descriptions may be picturesque, but I can find nothing in the record to support them.

T. Frederick Davis, *Juan Ponce de Leon's Voyages to Florida*, 14 FLA. HIST. Q. 7, 35-36 (1935).

The first flag to be displayed on a regular basis in Florida was the French "Chape de Martin."<sup>17</sup> A blue flag<sup>18</sup> with three<sup>19</sup> gold lilies<sup>20</sup> arranged in an alternating up-and-down pattern, the Chape de Martin arrived in Florida in 1564 when a group of French Huguenots, led by Rene de Goulaine de Laudionniere,<sup>21</sup> established Fort Caroline as the first permanent settlement in Florida. Located near present-day Jacksonville, the outpost fared badly from its inception due to internal conflicts, mutinies, and brutal reprisals,<sup>22</sup> and in 1565 the Spanish conquistador Pedro Menendez de Aviles<sup>23</sup> burned the fort to the ground and enslaved its inhabitants.<sup>24</sup>

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17. The flag was called the Chape de Martin because it was inspired by the story of Saint Martin. According to a popular legend, Martin shared his blue cloak, or chape, with a beggar at Amiens. This act of charity was said to have so touched Christ that he made the deed known to all the angels in heaven. See "Our Flag Number," 32 NAT'L GEOGRAPHIC 281, 373 (1917). Among its many contributions, the Chape de Martin is the basis of the word chaplain: "So important did the cloak of St. Martin become, the oratory in which it was carried came to be known as a chapel, from the Latin word for cloak (*cappa* or *capella*), and the priest in charge of it was known as a chaplain." SMITH, ACROSS THE WORLD, *supra* note 8, at 131.

18. Although the field of the Chape de Martin could be either blue or white in the sixteenth century, it is felt by most experts that the flag that flew in Florida was blue. See MORRIS, *supra* note 10, at 279 ("The flags of France of the 1500s had lilies both on white and blue backgrounds but the flag flown in Florida almost surely was the gold lily on blue."). This belief is based on the fact that the royal standard had a white field. CRAMPTON, *supra* note 2, at 41. As such, persons not part of the royal family generally used the blue version of the flag. Nevertheless, some commentators are convinced that the Huguenots flew the white version. See HERRICK, *supra* note 16, at 62 ("The French White Bourbon Flag, with Yellow fleur-de-lis, also flourished in North America during the life of the Huguenot colony in South Carolina and Florida, 1562-1565.") *Id.*

19. The number three is thought to have been chosen to honor the Holy Trinity. SMITH, ACROSS THE WORLD, *supra* note 8, at 131.

20. The lily, or fleur-de-lis, is the traditional emblem of France and dates to the twelfth century. CRAMPTON, *supra* note 2, at 40.

21. For a portrait of Laudionniere, see Charles E. Bennett, *A Footnote on Rene Laudionniere*, 45 FLA. HIST. Q. 289 (1967).

22. For a description of what life was like at Fort Caroline, see Charles E. Bennett, *Fort Caroline, Cradle of American Freedom*, 35 FLA. HIST. Q. 3 (1956), and Lucy L. Wenhold, *Manrique de Rojas' Report on French Settlement in Florida, 1564*, 38 FLA. HIST. Q. 45 (1959).

23. For profiles of Menendez, see Eugene Lyon, *Pedro Menendez's Strategic Plan for the Florida Peninsular*, 67 FLA. HIST. Q. 1 (1988); Albert Manucy, *The Man Who Was Pedro Menendez*, 44 FLA. HIST. Q. 67 (1965); and John F. Schwaller, *Nobility, Family, and Service: Menendez and His Men*, 66 FLA. HIST. Q. 298 (1988).

24. See Eugene Lyon, *The Captives of Florida*, 50 FLA. HIST. Q. 1 (1971).

Thereafter, France never again played a role in the settling of Florida,<sup>25</sup> although the Chape de Martin did reappear briefly over Pensacola in the Quadruple Alliance War.<sup>26</sup>

In the same year that they destroyed Fort Caroline, the Spanish founded Saint Augustine, the oldest city in the United States,<sup>27</sup> and raised the "Burgundian Saltire." Also called the Cross of Burgundy, it had a white field and a red saltire with serrated teeth.<sup>28</sup> The white represented the French state of Burgundy and the French crown; the knobby saltire signified the rough branches of the tree on which Saint Andrew, the patron saint of Burgundy, was crucified; and the red most probably symbolized Andrew's blood.<sup>29</sup>

The Burgundian Saltire was introduced into Spain by Philip I, the Duke of Burgundy, after his marriage in 1496 to Joan, the daughter of Ferdinand and Isabella.<sup>30</sup> Upon Ferdinand's death in 1516, the Castle and Lion flag increasingly gave way to Philip's flag. Thus, by the time Saint Augustine was organized, the Burgundian Saltire was in general use throughout the Spanish empire.<sup>31</sup>

For nearly two hundred years following the founding of Saint Augustine, the Burgundian Saltire served as Florida's flag. But in 1763, Spain lost control of Florida to England as a result of the Seven Years' War.<sup>32</sup> The transfer in governments resulted in numerous dislocations,<sup>33</sup>

25. Instead, France decided to focus its energies on present-day Canada. This effort proved very successful, and by 1697 the area around Quebec was known as New France. See further W. J. ECCLES, *FRANCE IN AMERICA* (rev. ed. 1990).

26. During the war, which began in 1719, control of Pensacola changed hands at least four times. Finally, in 1722, the city was ceded to Spain by treaty. *The Triangular Contest for Florida*, 21 FLA. HIST. Q. 281, 283 (1943).

27. See Luis R. Arana, *The Exploration of Florida and Sources on the Founding of St. Augustine*, 44 FLA. HIST. Q. 1 (1965).

28. As was true of other Spanish flags during this time, the appearance of the Burgundian Saltire was not uniform. Thus, for example, on religious holidays the field was blue and images of the Virgin Mary appeared in the quarters formed by the cross, while on other occasions the Spanish coat of arms was added to the ends of the arms. MORRIS, *supra* note 10, at 276.

29. *Id.*

30. Although Philip popularized the Burgundian Saltire, the first leader to use it was King Pelayo of Asturias in 718 A.D. See SMITH, *FLAG BOOK*, *supra* note 10, at 15.

31. MORRIS, *supra* note 10, at 276.

32. This capped a long drive by the British to oust the Spanish and take control of Florida. See Charles W. Arnade, *The English Invasion of Spanish Florida, 1700-1706*, 41 FLA. HIST. Q. 29 (1962), and J. Leitch Wright, Jr., *Sixteenth Century English-Spanish Rivalry in La Florida*, 38 FLA. HIST. Q. 265 (1960).

including the replacing of the red and white Burgundian Saltire by the red, white, and blue "Union Jack."<sup>34</sup>

The Union Jack, one of the most recognizable flags in the world,<sup>35</sup> was created in 1606 after King James VI of Scotland ascended the English throne and became King James I of England and Scotland. To commemorate the historic merger, the red cross of Saint George, the patron saint of England, was combined with the white saltire of Saint Andrew, the patron saint of Scotland.<sup>36</sup> Upon the overthrow of King Charles I by Oliver Cromwell in 1649, the Union Jack was changed to include an Irish harp. This symbol was removed, however, when the monarchy was restored in 1660.<sup>37</sup>

England's reign in Florida was both brief and difficult,<sup>38</sup> and in 1783 it returned Florida to Spain pursuant to the Treaty of Paris.<sup>39</sup> Thus, after an absence of just twenty years, the Burgundian Saltire once again graced

33. See Robert L. Gold, *Politics and Property During the Transfer of Florida from Spanish to English Rule, 1763-1764*, 42 FLA. HIST. Q. 16 (1963), and Wilbur H. Siebert, *How the Spaniards Evacuated Pensacola in 1763*, 11 FLA. HIST. Q. 48 (1932).

34. Although the British flag is universally known as the Union Jack, its official name is the Union Flag:

As well as being the national flag the Union Jack is also the jack used by ships of the Royal Navy, and some people think it should only be called the 'Union Jack' when used in this context. However, the practice of calling it the Union Jack in almost all circumstances is so widespread as to make it the flag's unofficial name. Officially, the government and the military still call it the 'Union Flag.'

CRAMPTON, *supra* note 2, at 23.

35. The universal recognition of the Union Jack is attributable to "its striking graphic design, its influence on other flags, and the importance of the British Empire (later Commonwealth) in world history." WHITNEY SMITH, *FLAGS AND ARMS ACROSS THE WORLD* 224 (1980).

36. Prior to the introduction of the Union Jack, England had used a white flag that bore a red cross while Scotland's flag consisted of a blue field and a white saltire. These designs dated back to the Crusades, when all Christians were assigned crosses of various styles and colors. CRAMPTON, *supra* note 2, at 23-24.

37. *Id.* at 23. The Union Jack now in use dates to 1801, when Ireland, England, and Scotland formed a parliamentary union. To mark Ireland's participation in the alliance, the red saltire of Saint Patrick was added to the Union Jack. Although Ireland became independent in 1921, the Union Jack was not changed. *Id.*

38. See Charles L. Mowat, *St. Augustine Under the British Flag, 1763-1775*, 20 FLA. HIST. Q. 131 (1941), and Robert R. Rea, "Graveyard for Britons," *West Florida, 1763-1781*, 47 FLA. HIST. Q. 345 (1969).

39. The bloodless return was especially sweet for Spain in light of the fact that its attempt to reclaim Florida through force had been a dismal failure. See Albert W. Haarmann, *The Spanish Conquest of British West Florida, 1779-1781*, 39 FLA. HIST. Q. 107 (1960).

Florida's skies. Its reinstatement, however, was short-lived, for on May 28, 1785, Spain's King Charles III replaced the Burgundian Saltire with a flag of his own design.<sup>40</sup>

The primary feature of the new flag was three horizontal stripes. The top and bottom stripes were red, while the larger middle stripe was yellow. These colors had been chosen because they were the heraldic colors of the Spanish regions of Castile (yellow) and Aragon (red).<sup>41</sup> Within the middle stripe, slightly to the left of the center, were placed a castle (to represent Castile) and a lion (for Leon).<sup>42</sup>

Although Charles' flag flew over Florida for thirty-six years, Spain's rule during this span was beset by numerous problems. In addition to having to contend with an assortment of pirates, Indians, and slaves, Spain faced numerous independence movements<sup>43</sup> that over time gave birth to several different unofficial flags.<sup>44</sup> Thus, in February 1821, Spain agreed

40. With only slight modification, Charles' flag continues to serve as Spain's national flag. CRAMPTON, *supra* note 2, at 63.

41. *Id.*

42. As another commentator has pointed out, the castle and lion continue to influence modern American design, and can be seen "in the seals or arms of such cities as Coral Gables, Los Angeles, New Orleans, and Sante Fe." SMITH, FLAG BOOK, *supra* note 10, at 15-16.

43. For an examination of the increasing unrest in Florida during this period, see Helen H. Tanner, *Zespedes and the Southern Conspiracies*, 38 FLA. HIST. Q. 15 (1959).

44. The first of these flags was devised by the English adventurer William A. Bowles. A longtime nemesis of the Spanish, Bowles in 1799 persuaded a congress of Seminoles and Creeks to make him "Director General" of a new state that Bowles hoped to organize around Tallahassee and call Muskogee. Upon his election, Bowles created a flag for his new state that had a blue cross edged in white surrounded by three red squares and one blue square. Unlike the red squares, which were empty, the blue square contained a yellow sun. In 1803, before Bowles had a chance to move ahead with his plans, he was captured by American agents and delivered to the Spanish authorities. He subsequently died in a prison in Havana. For a further discussion of the life and times of Bowles, see Jack D. L. Holmes & J. Leitch Wright, Jr., *Luis Bertucat and William Augustus Bowles: West Florida Adversaries in 1791*, 49 FLA. HIST. Q. 49 (1970); Lyle N. McAlister, *William Augustus Bowles and the State of Muskogee*, 40 FLA. HIST. Q. 317 (1962); and David H. White, *The Spaniards and William Augustus Bowles in Florida, 1799-1803*, 54 FLA. HIST. Q. 145 (1975).

After Bowles, the next flag to appear was the "Bonnie Blue Flag." A blue flag with a single white star, the Bonnie Blue Flag gained prominence during the Civil War when it was used throughout the South as an unofficial banner. It first appeared, however, over the "Free and Independent State of West Florida," an area located between the Pearl and Mississippi Rivers, from September 23, 1810 to December 6, 1810. Ironically, the State of West Florida's easternmost boundary was 140 miles west of what is now Florida; as a result, this flag never flew over any portion of present-day Florida. MORRIS, *supra* note 10, at 283. For the particulars of how Florida "lost" its western land, see Hugh C. Bailey, *Alabama and*

to give Florida to the United States in exchange for the United States assuming up to \$5 million in damages allegedly owed by Spain to American settlers living in Florida. Several months later, on July 17, 1821, transfer ceremonies were held in Pensacola and Saint Augustine. As Charles' flag was lowered for the last time, General Andrew Jackson, Florida's first American governor,<sup>45</sup> raised the "Stars and Stripes" of the United States.

### III. AMERICAN ACQUISITION AND STATEHOOD

From 1821 to 1845, Florida was a United States territory. Because Florida did not have its own flag during this period, the United States flag was used. At the time of Florida's acquisition, the flag had twenty-three stars. By 1845, when Florida was admitted to the Union, three more states had joined the Union. In keeping with the practice of adding one star to the flag for each new state, a twenty-seventh star was added for Florida on July 4, 1845.<sup>46</sup>

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*West Florida Annexation*, 35 FLA. HIST. Q. 219 (1956), and Hugh C. Bailey, *Alabama's Political Leaders and the Acquisition of Florida*, 35 FLA. HIST. Q. 17 (1956). Florida's current boundaries are set out in article II, section 1 of the Florida Constitution.

The final independence flags of this period are a legacy of the British blockade of East Florida. Although ultimately unsuccessful, the siege, which lasted from 1806 to 1812, helped to reveal the strategic importance of Amelia Island, see Christopher Ward, *The Commerce of East Florida During the Embargo, 1806-1812: The Role of Amelia Island*, 68 FLA. HIST. Q. 160 (1989), and made control of the island a top military objective. As a result, between 1812 and 1817 three different attempts were made to seize Amelia Island. The first, in March 1812, involved a group of seventy Georgians and nine Floridians who, after capturing the island, proclaimed the free "Territory of East Florida." They then raised the "Patriots Flag," a white field that depicted, in blue, a soldier above the Latin phrase "Salus Populi Lex Suprema" ("Safety, the Supreme Law of the People"). Five years later, in June 1817, Gregor MacGregor, a veteran of several Latin American revolutions, landed on Amelia Island and hoisted a white flag bearing a green cross. Finally, it is believed that General Luis Aury, the father of Mexico's independence movement, may have lifted a red, white, and green flag over Amelia Island in October 1817. If Aury had a flag, its design has not survived the vicissitudes of time. For further descriptions of the struggle for Amelia Island, see T. Frederick Davis, *MacGregor's Invasion of Florida, 1817*, 7 FLA. HIST. Q. 3 (1928), and Richard G. Lowe, *American Seizure of Amelia Island*, 45 FLA. HIST. Q. 18 (1966).

45. For accounts of Jackson's role in Florida, see Herbert J. Doherty, Jr., *The Governorship of Andrew Jackson*, 33 FLA. HIST. Q. 3 (1954), and Herbert J. Doherty, Jr., *Andrew Jackson vs. The Spanish Governor*, 34 FLA. HIST. Q. 142 (1955).

46. The Stars and Stripes, consisting of thirteen red and white stripes and an equal number of white stars on a blue canton, was adopted as the official flag of the United States by the Continental Congress on June 14, 1777. See II JOURNAL OF THE AMERICAN CONGRESS 165 (1823). Following the Revolutionary War, the flag remained unchanged for

As part of the statehood application process, territories were required to draft and submit to Congress a proposed constitution. Florida took this step in 1838.<sup>47</sup> In keeping with the custom of the day, the constitution made no provision for a state flag.<sup>48</sup> As a result, Florida did not have an official flag when it became a state on March 3, 1845.<sup>49</sup>

At 12:00 noon on June 25, 1845, William D. Moseley was inaugurated

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ten years. The admission of Kentucky and Vermont in 1792, however, raised the question of whether the flag should be altered as new states joined the Union. Many members of Congress opposed changing the flag, pointing out that it would be expensive for shipowners to acquire new flags, and the issue became a fiercely debated one. Finally, a law was passed providing that after May 1, 1795, the flag would have fifteen stripes and fifteen stars. *See* Act of Jan. 13, 1794, ch. 1, 1 Stat. 341. The admission of still more states, however, threatened to make the design of the flag unwieldy. As a result, in 1818, Congress, acting on a proposal introduced by Representative Peter Wendover of New York, decreed that henceforth the flag would have thirteen stripes and one star for each state, with new states receiving their stars on the first July 4th after their admission. Since 1947, the design of the flag has been codified, *see* 4 U.S.C. §§ 1-2 (1988), although details on the number of stars, dimensions, color, and miscellany are controlled by executive order. The flag assumed its present configuration in 1959, when Hawaii became the fiftieth state. *See* Exec. Order No. 10834, 3 C.F.R. 367 (Aug. 21, 1959). For histories of the flag, *see* DAVID EGGENBERGER, *FLAGS OF THE U.S.A.* (1964); WILLIAM R. FURLONG & BYRON McCANDLESS, *SO PROUDLY WE HAIL: THE HISTORY OF THE UNITED STATES FLAG* (1981); SCOT M. GUENTER, *THE AMERICAN FLAG, 1777-1924: CULTURAL SHIFTS FROM CREATION TO CODIFICATION* (1990); PELEG D. HARRISON, *THE STARS AND STRIPES AND OTHER AMERICAN FLAGS* (5th ed. 1914); BOLESŁAW MASTAI & MARIE-LOUISE D'OTRANGE MASTAI, *THE STARS AND STRIPES* (1973); and MILO M. QUAIFE, MELVIN J. WEIG & ROY E. APPLEMAN, *THE HISTORY OF THE UNITED STATES FLAG* (1961).

47. *See* F. W. Hoskins, *The St. Joseph Convention: The Making of Florida's First Constitution*, 16 FLA. HIST. Q. 33 (1937).

48. Although each colony had a state seal prior to the start of the Revolutionary War, none had a flag, and it was not until the Civil War that states began using flags. Today, however, every state has an official flag. *See* RITA D. HABAN, *HOW PROUDLY THEY WAVE: FLAGS OF THE FIFTY STATES* (1989), and BENJAMIN F. SHEARER & BARBARA S. SHEARER, *STATE NAMES, SEALS, FLAGS, AND SYMBOLS: A HISTORICAL GUIDE* (1987).

49. To maintain the delicate balance between free and slave states established by the Missouri Compromise of 1820, Congress authorized the territories of Florida and Iowa to enter the Union as soon as they met the requirements for admission. Although Florida qualified immediately, Iowa's admission was delayed pending settlement of a boundary dispute and the submission of an acceptable state constitution. *See* Franklin A. Doty, *Florida and Iowa: A Contemporary View*, 36 FLA. HIST. Q. 24 (1957), and Franklin A. Doty, *Florida, Iowa, and the National "Balance of Power," 1845*, 35 FLA. HIST. Q. 30 (1956). For a description of what Florida was like when it became a state, *see* Dorothy Dodd, *Florida in 1845*, 24 FLA. HIST. Q. 3 (1945).



as Florida's first state governor.<sup>50</sup> Earlier in the day, James E. Broome, chairman of the citizens' committee on inaugural arrangements, had presented a colorful new flag to the governor-elect and the joint legislative committee on the inauguration.<sup>51</sup> While no copies remain in existence, eyewitness reports describe the flag as having five horizontal stripes, each in a different color.<sup>52</sup> The flag also depicted the United States flag in the canton,<sup>53</sup> as well as a white scroll on the second stripe that bore the motto "Let Us Alone."<sup>54</sup>

Although no official explanation of the significance of the design or the colors was provided,<sup>55</sup> upon receiving the flag the joint legislative committee introduced a resolution in both chambers of the General Assembly providing "That the Colors now presented be the Colors of the State of Florida, till changed by law, and that the same be placed over the Speaker's chair of the House of Representatives."<sup>56</sup> The House at once adopted the

50. Born in North Carolina in 1795, Moseley had been educated at the University of North Carolina. Following graduation, he became a successful lawyer in Wilmington and later served in the North Carolina State Senate. Unsuccessful in his bid to become the Democratic nominee in the North Carolina gubernatorial race in 1834, Moseley moved to Florida in 1835. He immediately became involved in territorial politics and was elected governor of Florida in 1845, defeating his Whig opponent Richard K. Call by a vote of 3,292 to 2,679. Because the 1838 Constitution prohibited him from running for reelection, Moseley retired to his plantation on Lake Miccosukee at the conclusion of his term in October 1849, and died in Palatka on January 4, 1863. 1 BIOGRAPHICAL DIRECTORY OF THE GOVERNORS OF THE UNITED STATES, 1789-1978, at 251 (Robert Sobel & John Raimo eds. 1988).

51. Dorothy Dodd, *The Flags of the State of Florida*, 23 FLA. HIST. Q. 160, 161 (1945). The flag had been prepared by a group of Tallahassee citizens with the approval of Governor Moseley. *Id.* at 160.

52. *Id.* Although modern-day drawings of the flag always show the stripes as being, from top to bottom, blue, orange, red, white, and green, whether this was the actual arrangement is open to debate because "[c]ontemporaneous accounts vary as to the sequence of the colors of the flag." T. Frederick Davis, *Pioneer Florida*, 22 FLA. HIST. Q. 134, 137 n.\* (1944).

53. Dodd, *supra* note 51, at 160. It was not at all uncommon during this period to depict a separate flag in the canton. The "Continental Colors," the flag used by George Washington prior to the adoption of the Stars and Stripes, for example, included the Union Jack in its canton. See CRAMPTON, *supra* note 2, at 30. Likewise, Hawaii's state flag, which was adopted in 1845, displays the Union Jack in its canton. *Id.* at 33.

54. Dodd, *supra* note 51, at 160.

55. Davis, *supra* note 52, at 137. The editor of the *Tallahassee Star* suggested that the colors of the flag "were intended to represent youth, energy, purity etc." *Id.* at 137 n.\*.

56. See FLA. S. JOUR. 8 (1845); FLA. H. R. JOUR. 10 (1845). Although modern flag etiquette would prohibit the draping of the flag over a chair, nineteenth century conventions were considerably more relaxed:

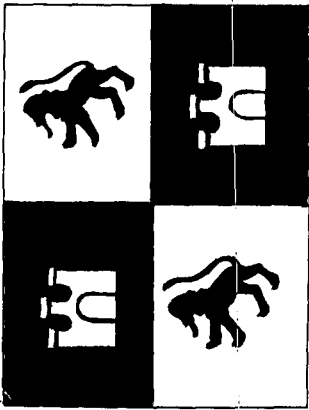
In the United States, what one law professor has termed "vexillatry" or the

exaltation of the flag "into a kind of mystical reification of the nation," is a relatively recent development clearly associated with the growth of American nationalism in the post-Civil War era. Apparently, great patriots of the past committed acts that qualify as flag desecration under modern standards: for example, one photograph which survives from the Civil War shows President Lincoln and General McClellan eating at a table covered with a flag. Furthermore, the law has only recently recognized national respect for the flag. Congress declared the "Star Spangled Banner" to be the national anthem only in 1931, and it declared "The Stars and Stripes Forever" to be the national march in 1987. Congress did not establish Flag Day until 1949, and expanded the observance into Flag Week only in 1966. Although a magazine first published the Pledge of Allegiance in 1892, the government did not endorse the Pledge until 1942, when Congress codified flag etiquette for the first time. Most significantly, while the first state laws prohibiting flag desecration date only from 1897, no federal flag desecration law was passed until 1968.

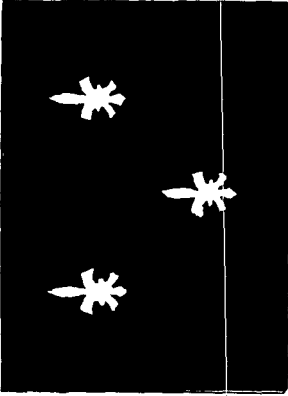
Robert J. Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis*, 45 U. MIAMI L. REV. 19, 36-37 (1990). For a further discussion of the evolution of flag etiquette in the United States, see Emmet V. Mittlebeeler, *Flag Profanation and the Law*, 60 KY. L.J. 885 (1972).

In recent times, of course, the subject of flag desecration has been a much debated one. On June 21, 1989, the United States Supreme Court struck down as unconstitutional a Texas statute that outlawed flag burning. *See Texas v. Johnson*, 491 U.S. 397 (1989). The decision ignited a firestorm of public indignation, led President Bush to call for a constitutional amendment, and resulted in the passage of the Flag Protection Act of 1989. *See Pub. L. No. 101-131, § 2(d)(2)*, 103 Stat. 777 (amending 18 U.S.C. § 700). Flag burners in Seattle and Washington, D.C., quickly tested the new law, and, on June 11, 1990, the United States Supreme Court ruled that the Act was invalid. *See United States v. Eichman*, 496 U.S. 310 (1990). Although Congressional Republicans vowed to renew their efforts to pass a constitutional amendment, by September 1990 the issue had disappeared in the face of the recession and the increasingly tense situation in Kuwait. For a further look at the crisis, see Douglas W. Kmiec, *In the Aftermath of Johnson and Eichman: The Constitution Need Not Be Mutilated to Preserve the Government's Speech and Property Interests in the Flag*, 1990 B.Y.U. L. REV. 577; Daniel H. Pollitt, *The Flag Burning Controversy: A Chronology*, 70 N.C. L. REV. 553 (1992); and George S. Swan, *The Political Economy of Congressional Social Policymaking: United States v. Eichman and Texas v. Johnson*, 19 N.C. CENT. L.J. 146 (1991). *See also* Peter E. Quint, *The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany*, 15 HASTINGS INT'L & COMP. L. REV. 613 (1992).

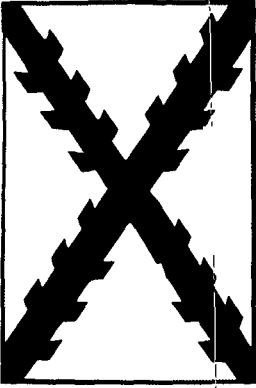
Several years after *Johnson* and *Eichman*, the subject of flag desecration was revived in an international setting when the Canadian flag was displayed upside-down by a United States Marine Corps color guard before the start of the second game of the 1992 World Series between the Atlanta Braves and the Toronto Blue Jays. *See World Series Notebook: Flag, If Not Jays, Was Upended*, N.Y. TIMES, Oct. 19, 1992, at C8. Although the incident threatened to ruin the fall classic, the crisis was defused after President Bush apologized for the mistake and a different Marine color guard carried the flag correctly before the start of the third game. *See* Claire Smith, *World Series: Marines Rally 'Round the Maple Leaf*,



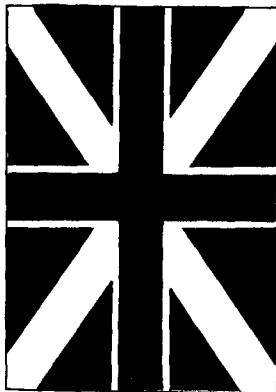
Castle and Lion (1513)



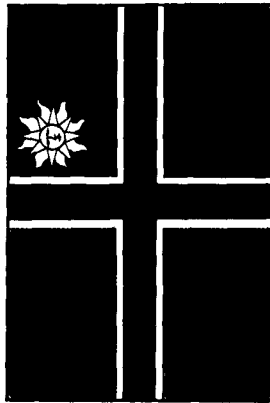
Chape de Martin (1564)



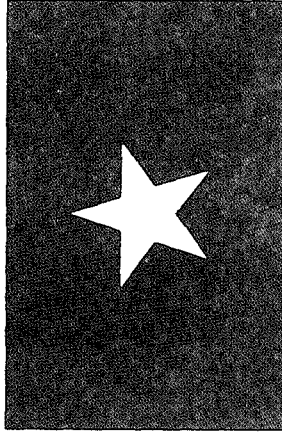
Burgundian Saltire (1565)



Union Jack (1763)



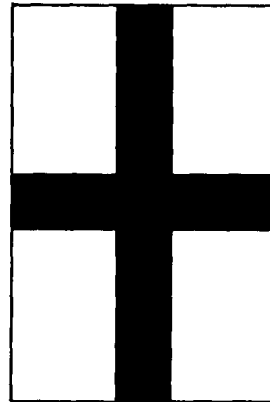
Bowles Flag (1799)



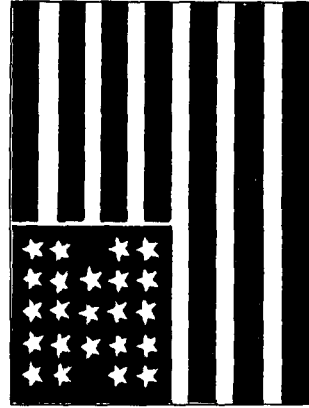
Bonnie Blue Flag (1810)



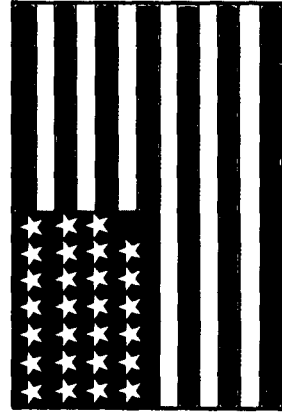
Patriots Flag (1812)



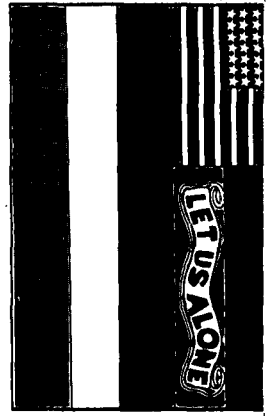
MacGregor Flag (1817)



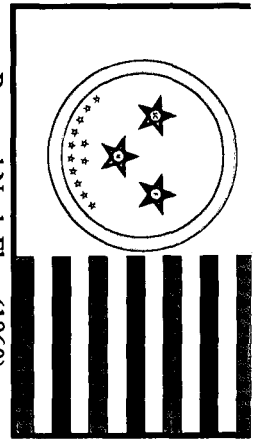
Stars and Stripes (1821)



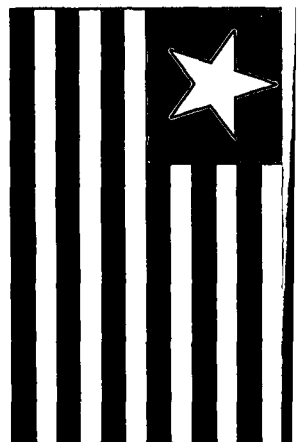
Stars and Stripes (1845)



Moseley Flag (1845)



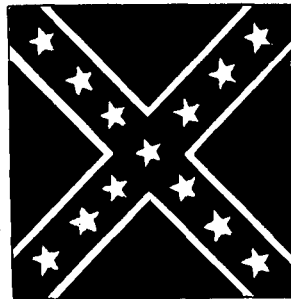
Broward Neck Flag (1860)



Texas Navy Flag (1861)



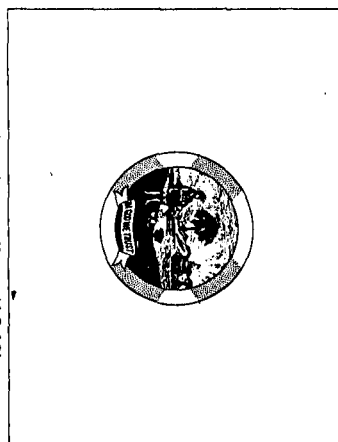
Perry Flag (1861)



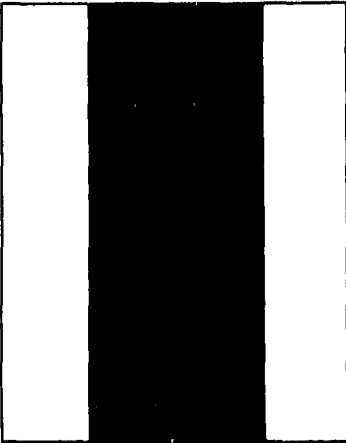
Southern Cross (1861)



Stainless Banner (1865)



Florida State Flag (1868)



Miccosukee Flag (1962)



Seminole Flag (1966)



Florida State Flag (Current)

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resolution, as well as a proclamation giving thanks "to the patriotic citizens of Tallahassee for the present stand of colors for the State of Florida."<sup>57</sup> Matters did not go as smoothly in the Senate however, and as noon approached the resolution still had not been passed. With a large crowd beginning to gather at the recently-completed capitol for the swearing-in ceremony,<sup>58</sup> the Senate finally had no choice but to adjourn, thereby leaving the issue unsettled.

While Moseley's inaugural address "was rather modest and unassuming," when he finished the large crowd "responded to [it with] deafening shouts."<sup>59</sup> A twenty-eight gun salute then was fired, the Stars and Stripes and the proposed flag were raised, and the band struck up "Yankee Doodle Dandy."<sup>60</sup>

In the days following the inauguration, the debate over the flag resumed. As before, the sole issue was the flag's motto. While the

*Easing a Flap*, N.Y. TIMES, Oct. 21, 1992, at B11. For an interesting discussion of the obligations that the United States owes to the flags of other nations, see Mark C. Phillips, Comment, *Protecting National Flags: Must the United States Protect Corresponding Foreign Dignity Interests?*, 20 CAL. W. INT'L L.J. 329 (1989-1990).

57. See FLA. H.R. JOUR. 11 (1845).

58. As in modern times, Moseley's inauguration attracted a great deal of public interest. According to one commentator: "Burying the animosities and differences of the late political campaign, residents of Florida flocked to Tallahassee by the hundreds to observe Florida's official entrance into the Union; it is said that several thousand visitors assembled there to witness the ceremonies [which lasted for three days]." Davis, *supra* note 52, at 135-36. For a brief look at the inaugurations of other Florida governors, see MORRIS, *supra* note 10, at 267-73.

59. Davis, *supra* note 52, at 138-39. Although no copies of the actual text remain, it is estimated that Moseley's speech ran 2,250 words. *Id.* at 139. In contrast, the average presidential inaugural address contains 2,399 words. JOSEPH N. KANE, FACTS ABOUT THE PRESIDENTS: A COMPILATION OF BIOGRAPHICAL AND HISTORICAL INFORMATION 377 (5th ed. 1989). While George Washington needed only 135 words when he was inaugurated in 1793, and Abraham Lincoln limited his remarks to 698 words at the 1865 inauguration, Moseley's speech was brief compared to other inaugural addresses of the 1840s. Just two months before Moseley was inaugurated, for example, his college classmate, James K. Polk, became the nation's eleventh president and delivered a 4,776 word speech. *Id.* Four years earlier, on March 4, 1841, William Henry Harrison gave what remains the longest inaugural address in presidential history: 8,445 words. *Id.* As is well known, Harrison contracted pneumonia while presenting his speech and died on April 4, 1841.

60. Dodd, *supra* note 51, at 160. Some commentators, however, believe that the flag was raised *before* Moseley began his speech. See Davis, *supra* note 52, at 138 ("Promptly at noon, Mr. Moseley appeared on the east portico of the capitol to deliver his inaugural address before the General Assembly and 'several thousand' Floridians gathered in front of the building. Simultaneously, the new State flag was hoisted on the flagstaff of the capitol.").

Democrats contended that it was a fitting credo,<sup>61</sup> the Whigs countered that it was nothing more than a party slogan,<sup>62</sup> and for the next six months the debate dragged on as the issue was raised, debated, tabled, and then raised again.<sup>63</sup> Finally, however, on December 27, 1845, the Democrats prevailed

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61. While it is not known what the public thought of the motto, at least one source has concluded that the phrase "probably represented the sentiments of most Floridians[.]" CHARLTON W. TEBEAU, *A HISTORY OF FLORIDA* 173 (rev. ed. 1980). Another has gone even further, contending that the phrase was placed on the flag as a warning to the federal government not to meddle in the state's affairs:

At the inauguration of Governor Moseley, the ceremonies of which were performed in the completed capitol, a state flag was displayed consisting of horizontal stripes of blue, orange, red, white and green bearing the motto, "Let Us Alone." The motto was significant, in view of the long period of discussion over the aggressions of the Federal Government and the North, and the warnings of Florida nullifiers who were following Calhoun rather than Jackson. The strong States Rights element had also introduced into the [territorial] council's call for a constitutional convention the phrase "the admission of Florida into the National Confederacy." The state flag placed an added emphasis on the "Let-Us-Alone" attitude of Florida. The new state asked to be allowed to work out her own salvation.

I *HISTORY OF FLORIDA: PAST AND PRESENT* 121 (Harry G. Cutler ed. 1923).

62. It has been written elsewhere that:

No one seems to have objected to the rather bizarre color combination, but the motto raised a furor. The Whigs charged that "Let us alone" was a party motto, "now about being foisted upon this State" by the Democrats. The *Floridian*, a Democratic organ, seeking to refute this, claimed that it was "the substance of the answer of the French manufacturers of Lyons, to the French minister of Finance (Colbert), when he asked what they wished the Government to do for them." To which the Whig *Sentinel* rejoined, if its origin was sought it would be found to be "the frantic exclamation of an 'unclean spirit' to our Saviour." (Mark 1:24)

Dodd, *supra* note 51, at 160-61.

63. The odyssey endured by the Senate has been described as follows:

But the Whigs in the Senate, though in the minority, succeeded in having consideration of the resolution deferred from day to day. On June 27, R. B. Haughton, "after briefly stating his objections to the motto, appealed to the liberality of the majority for further time, in order to propose a substitute." George S. Hawkins replied "that there was no disposition to press the matter too urgently; but if it was procrastinated, the gentleman should obligate himself to show a better. Mr. Haughton thought this could easily be done and he would undertake it."

The resolution was again debated on July 2, when a number of devices were suggested. When Haughton proposed "a magnolia with a rattlesnake entwined around its trunk, with an English motto which we (the editor of the *Sentinel*) have forgotten," Hawkins approved the device but suggested "Let us alone" as an appropriate motto. Among other suggestions were, "A single Live

and a resolution adopting the flag and its motto "as the Flag of the State of Florida" was approved by a vote of 8 to 5.<sup>64</sup>

Rather than bringing the furor over the flag to an end, the Senate's action sparked a new controversy as to whether the resolution had been in the proper form.<sup>65</sup> By now, however, the Senate had grown weary of the entire issue and therefore decided to move on to other business. As for the flag itself, following its unveiling at the inauguration it was never flown again, and eventually either was discarded or lost.<sup>66</sup>

#### IV. THE CIVIL WAR

The election of Abraham Lincoln on November 2, 1860 resulted in calls for secession throughout the South, and before the year was out South Carolina had left the Union. In Florida, reaction was almost as swift, and on November 30, 1860 Governor Madison S. Perry signed a bill authorizing the holding of a convention to consider whether Florida should disassociate itself from the United States.<sup>67</sup> On the same day, Senator George W. Call, the sponsor of the secession act, introduced a bill proposing that Florida adopt a state uniform and flag.<sup>68</sup> Although the bill was approved by the Senate on December 1, 1860, time did not permit the House of Representatives to consider it before adjourning for the year. As a result, the matter was not taken up by the House until the following February.<sup>69</sup>

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oak, with the motto, '*Robore, sicut fronde perennis*,'—in strength as in verdure perpetual," and "a Live Oak upon a craggy beach, against which the surfs of a raging sea are beating, and in the distance a view of the tempestuous ocean, with the motto, 'The same in sunshine as in storm.'" No agreement being reached, the resolution was referred to a select committee, which failed to make a report on it.

*Id.* at 161-62.

64. *Id.* at 162.

65. While the Senate had passed a resolution, the House's approval had been expressed in a joint resolution. This led opponents of the flag to argue that the Senate's action had no effect: "'Therefore,' the *Florida Sentinel* pointed out, 'although both houses have passed upon this motto, and approved it, yet for want of attention to the matter of form, it has not been legally adopted, and it is *not* the motto of the State.'" *Id.*

66. *Id.* ("Whether legally adopted or not, presumably the flag thereafter gathered dust over the speaker's chair, for we hear no more of it.")

67. For a look at Florida during the year leading up to the Civil War, see George C. Bittle, *Florida Prepares for War 1860-1861*, 51 FLA. HIST. Q. 143 (1972).

68. Dodd, *supra* note 51, at 163.

69. *Id.*

In the interim between Lincoln's election and the start of the Convention, numerous unofficial secession flags began to appear throughout Florida.<sup>70</sup> Of these, the one to gain the greatest prominence was a flag prepared by the "Ladies of Broward Neck," a community in Duval County, and presented to the governor by Miss Helen Broward on December 28, 1860.

The flag had a white field and the motto "The Rights of the South At All Hazards" painted in black across the top.<sup>71</sup> On the hoist below the legend was a pale blue circle that had two large dark blue stars and twelve small light blue stars.<sup>72</sup> The fly, meanwhile, had an alternating pattern of red, white, and blue stripes.<sup>73</sup> In acknowledging "the receipt of the beautiful States Rights flag," Governor Perry promised that the flag would "be unfurled on all fitting occasions which may present themselves in the progress of the important and interesting events which are now daily transpiring."<sup>74</sup>

The Secession Convention began on January 3, 1861, and one week later the delegates voted sixty-two to seven to secede from the Union.<sup>75</sup> On the next day, January 11, 1861, the Ordinance of Secession was signed on the east portico of the capitol. After the last delegate had affixed his signature, a fifteen gun salute was fired to usher in the new nation. Governor-elect John Milton, who was presiding due to the illness of Governor Perry, then presented Miss Broward's flag to the Convention.<sup>76</sup> The news that the Secession Ordinance had been signed triggered merrymaking throughout the state, and in Saint Augustine a locally-produced flag bearing

70. *Id.*

71. MORRIS, *supra* note 10, at 279.

72. The two large stars were intended to portray South Carolina and Florida as the first two states to secede from the Union, while the twelve small stars were meant to represent the states that were expected to join them: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Just days before Florida seceded, however, Mississippi left the Union, and a third large star was hastily added to the flag. Mississippi is therefore represented by both a large and a small star. Dodd, *supra* note 51, at 165 n.21.

73. MORRIS, *supra* note 10, at 279.

74. Dodd, *supra* note 51, at 163-64.

75. Despite the lopsided margin by which the secession ordinance passed, at least one scholar has suggested that most Floridians did not want to leave the Union. See John F. Reiger, *Secession of Florida from the Union—A Minority Decision?*, 46 FLA. HIST. Q. 358 (1968).

76. Although Miss Broward's flag was not officially adopted, it was displayed on the rostrum of the Florida House of Representatives throughout the Civil War. MORRIS, *supra* note 10, at 279-80.



a palm tree and an eagle was raised over the city.<sup>77</sup>

Recognizing that the United States was now a foreign nation and that war was likely, Governor Perry dispatched Captain V. M. Randolph and Richard L. Campbell to seize the Pensacola Navy Yard. Encountering little resistance, Randolph and Campbell quickly secured the vital base and on the next day, January 13, 1861, replaced the Stars and Stripes with an improvised flag. Even by impromptu standards, however, the new flag was a rather pathetic sight,<sup>78</sup> and upon seeing it Colonel William H. Chase, the commander of the Florida troops stationed in Pensacola, ordered all Floridians to fly the United States flag modified so as to have just one white star in the canton until a permanent flag could be adopted.<sup>79</sup>

77. The description of the Saint Augustine flag comes from a story carried in the January 19, 1861 issue of the *St. Augustine Examiner*:

"[T]he report [that the Secession Ordinance had been signed] was communicated almost instantly to the entire population, and there was exhibited a scene of intense excitement never before witnessed by us. In approbation of the result, all the bells of the City reechoed in loud, long and continuous peals the feelings of a rejoicing public." Later in the day public ceremonies were held in the Plaza. . . . After an address by Judge Benjamin A. Putnam, "the national flag of Florida, wrought by the fair hands of some of our patriotic ladies . . . rose beautifully amidst deafening cheers and saluting discharges of artillery and small arms, and as it reached the top of the staff unfolded gracefully and expanded to a favoring breeze, bearing on its ground the cherished Palmetto with an Eagle resting on a globe and holding in its mouth the State's motto, '*Let us alone.*'"

Dodd, *supra* note 51, at 166.

78. According to one account, the flag was "a dingy white flag" that "looked like an old signal flag with a star put on it." *Id.*

79. Born in Massachusetts, Chase had moved to Pensacola at a young age. A graduate of West Point, he was a man of considerable influence and eventually rose to the rank of major general in the Florida militia. Cutler, *supra* note 61, at 140. Being a highly-trained military officer, Chase's order was both detailed and explicit, and left little to the imagination:

Colonel William H. Chase, commanding the Florida troops, immediately took steps to replace this obvious makeshift with a more suitable flag. By General Order No. 3, issued January 13, he required a flag, whose design he prescribed, to be displayed at the Navy Yard, forts, barracks, and hospital in possession of state troops. "Until otherwise ordained by the people of Florida assembled in convention," the order read, "the emblems of the flag will be thirteen stripes, alternate red and white, commencing with the red, a blue field, with a large white star in the center." On January 14, the commander of the U. S. S. *Wyandotte*, lying in Pensacola harbor, noted in his log, "Florida forces hoisted the American flag with lone star." Chase's order required that the flag, when hoisted for the first time, be saluted with thirteen guns.

Dodd, *supra* note 51, at 167.

From a historical standpoint, Chase's flag was a poor choice for a people attempting to distance themselves from the United States. Designed in 1836 for use by the Texas navy, the flag had been intended to demonstrate solidarity with the United States during the days of the Texas Republic.<sup>80</sup> Nevertheless, Chase's order was accorded widespread respect and was complied with throughout Florida.<sup>81</sup>

On February 1, 1861, the House of Representatives, having reassembled following the Secession Convention, took up Senator Call's flag bill. Not surprisingly, the bill passed without dissent and was signed into law on February 8, 1861.<sup>82</sup> As approved, the bill directed the governor "by and with the consent of his staff" to adopt "an appropriate device for a State flag, which shall be distinctive in character."<sup>83</sup>

One month later, on March 4, 1861, the Provisional Congress of the Confederate States of America selected the "Stars and Bars" to be the national flag of the Confederacy.<sup>84</sup> Modelled after the Stars and Stripes,

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80. Like Florida, Texas originally had belonged to Spain, but became a Mexican possession in 1821 when that country broke away from Spain. Following increasing hostilities, Texas declared her independence from Mexico on March 2, 1836, and thereafter was a self-governing republic. On December 29, 1845, Texas became the twenty-eighth state to join the United States, just ten months after Florida had been admitted to the Union. During the nine years that Texas was a republic, a number of different flags were used, including a flag known as the "Texas Naval Ensign:"

During the era of the Republic, Texas also had distinctive flags for use at sea. During the pre-independence period of the revolution, Texas privateers flew the "1824" flag. In 1836, this was replaced by the ensign of the Texas Navy. The Texas naval ensign proclaimed the attachment of Texas to the United States, both symbolically and diplomatically, and was in fact the flag of the United States with a lone star in the union. This ensign graced the naval vessels of the Republic until Texas became one of the United States in 1845.

DEVEREAUX D. CANNON, JR., *THE FLAGS OF THE CONFEDERACY: AN ILLUSTRATED HISTORY* 43 (1988). For a detailed look at the flags of Texas, see Charles A. Spain, *The Flags and Seals of Texas*, 33 S. TEX. L. REV. 215 (1992).

81. MORRIS, *supra* note 10, at 279.

82. Dodd, *supra* note 51, at 167.

83. *Id.*

84. Adoption of the Stars and Bars had proven rather contentious, and in many ways was the first tangible crisis faced by the seceding states:

For the first twenty-four days of the existence of their government, the Confederate States of America had no officially approved flag. When Jefferson Davis was inaugurated President of the provisional government on February 18, 1861 the capitol building in Montgomery flew the flag of the State of Alabama, and the inaugural parade was lead [sic] by a company of infantry carrying the flag of Georgia.

The Provisional Congress had established a Committee on Flag and Seal,

the Stars and Bars consisted of three horizontal stripes, or bars, in an alternating combination of red-white-red, and a blue canton bearing seven white stars arranged in a circle.<sup>85</sup> Within weeks, use of the Stars and Bars had spread throughout the South,<sup>86</sup> and in Florida Governor Perry decided to model the new state flag after the Stars and Bars.<sup>87</sup> Consequently, on September 13, 1861, an executive order was issued establishing as the new state flag a vertically split field with a blue hoist bearing a white shield and a fly with the same stripes as the ones found on the Stars and Bars.<sup>88</sup>

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the chairman of which was William Porcher Miles of South Carolina. The Committee received hundreds of designs for flags which were submitted to it by citizens from all parts of the country. Even citizens of States still among the United States sent in proposals. An unwritten deadline for the adoption of a flag was March 4, 1861 because on that date Abraham Lincoln was to be inaugurated president of the now foreign United States; and on that date the Southern States were determined to fly a flag which expressed their own sovereignty.

As the deadline neared, the Committee continued to examine and debate designs without being able to reach a consensus. . . . The Committee finally had to admit its inability to agree on a flag and chose four patterns to present to the full Congress for a final decision.

[Thus, o]n the morning of March 4, large cambric models of the proposed flags were hung up on the walls of the Congressional chamber.

CANNON, *supra* note 80, at 7.

85. Although it now seems odd that the Provisional Congress would have selected a flag that so closely resembled the Stars and Stripes, the "sentimental attachment to 'the old flag' felt by the public at large . . . made it impossible [for either the Flag Committee or the Congress] to ignore the elements of its design." *Id.*

86. "The use of this new flag not only spread rapidly across the Confederate States but also among Confederate sympathizers in States still in the old Union." *Id.* at 10.

87. *Id.* at 37 ("The flag adopted by the Confederate Congress on March 4, 1861 was altered to serve Florida's needs by extending the canton to form a vertical bar the entire width of the flag.").

88. More precisely, the executive order described the flag as follows:

The one half of the Flag next to the Staff is blue: the other half has alternately one red, one white, one red stripe. Each stripe (three in all) [is] of equal width and perpendicular to the staff. (The stripes are the same as the Confederate stripes, only they form one half the Flag). On the blue ground, and occupying somewhat more than one half of it is an elliptical band (the axis of the ellipse in the proportion of fifteen to thirteen, the longitudinal axis parallel with the Flag Staff) bearing superiorly 'In God is Our Trust'—Inferiorly—'Florida'—making as it were a frame for the Shield. In the centre of the ellipse is a single strong Live Oak Tree. Beyond it is seen the Gulf of Mexico, with vessels in the distance. In front of and near the foot of the Oak is a piece of Field Artillery. Beyond the gun, and resting against the boll of the Oak, is seen a stand of six colors—the Confederate and State Flags, to the front. To the left of the Fieldpiece are Four Muskets stacked. To the right and near, balls piled,

Perry's flag apparently failed to generate much enthusiasm, for it appears that it was never "raised over the capitol or in the field."<sup>89</sup> Instead, like most Southerners, Floridians preferred using the Confederate battle flag. Known as the "Southern Cross," this highly distinctive flag had a red field and contained a blue saltire with thirteen white stars arranged inside the arms. Designed by William Porcher Miles of South Carolina, it had been submitted for consideration as the national flag. When the Stars and Bars were selected instead, General Joseph E. Johnston adopted the Southern Cross as the battle flag of the Army of the Potomac.<sup>90</sup> In time, the Southern Cross became the unofficial flag of the South and appeared in a multitude of civilian and military styles.<sup>91</sup>

#### V. RECONSTRUCTION AND THE END OF THE NINETEENTH CENTURY

On April 9, 1865, General Robert E. Lee surrendered his troops to General Ulysses S. Grant at the Appomattox courthouse.<sup>92</sup> The defeat of the Confederacy ushered in a period of hard feelings between the victorious North and the vanquished South, and, in time, resulted in the formulation of a stern national reconstruction plan.

In order to end the military occupation that had been established and be readmitted to the Union, Southern states were required to pass new constitutions that renounced slavery, guaranteed equal protection to all

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and a drum.

Dodd, *supra* note 51, at 167-68.

89. *Id.* at 168.

90. CANNON, *supra* note 80, at 51-54.

91. For a detailed history of the Southern Cross as well as other Confederate battle flags, see ECHOES OF GLORY: ARMS & EQUIPMENT OF THE CONFEDERACY 230-81 (Henry Woodhead ed. 1991).

92. Because of communication difficulties, troops stationed in Florida did not begin to surrender until May 10, 1865, and it was not until May 20, 1865 that General Edward M. McCook took formal possession of Tallahassee and raised the United States flag over the capitol. Morris, *supra* note 10, at 415. For the most part, Florida was untouched by the Civil War, and the only battle of consequence to be fought in the state was the Battle of Olustee, which occurred on February 20, 1864. As a result, Tallahassee was the only confederate capital east of the Mississippi not to be invaded by Union troops. For a further discussion of the role of Florida in the Civil War, see Allen W. Jones, *Military Events in Florida During the Civil War, 1861-1865*, 39 FLA. HIST. Q. 42 (1960), and John F. Reiger, *Florida After Secession: Abandonment by the Confederacy and Its Consequences*, 50 FLA. HIST. Q. 128 (1971).

citizens, repudiated the Confederate war debt, and punished anyone who had taken up arms against the Union. Although Florida adopted a new constitution on November 7, 1865, it fell far short of what the Radical Republicans in Congress expected and was rejected in 1867.<sup>93</sup> As a result, Florida was returned to military control and remained in that status until a constitution acceptable to the North was passed on May 8, 1868.<sup>94</sup>

Because the Civil War had made flags very popular,<sup>95</sup> the 1868 constitution's "Miscellaneous" article directed the Legislature to "adopt a State Emblem having the design of the Great Seal of the State impressed upon a white ground of six feet six inches fly and six feet deep."<sup>96</sup> Since Florida did not have an official state seal at the time the 1868 constitution was ratified,<sup>97</sup> the design of the flag was not finalized until August 6, 1868, when the Legislature met and passed a joint resolution adopting a seal.<sup>98</sup>

93. See TEBEAU, *supra* note 61, at 239-47.

94. The military occupation of Florida is discussed further in Merlin G. Cox, *Military Reconstruction in Florida*, 46 FLA. HIST. Q. 219 (1968), while the drafting of the 1868 Constitution is set out in Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South*, 51 FLA. HIST. Q. 1 (1972), and Jerrell H. Shofner, *The Constitution of 1868*, 41 FLA. HIST. Q. 356 (1963). In large part, the 1868 constitution was written by Northerners who had migrated to Florida to take advantage of the post-war chaos. Because such persons were called "carpetbaggers," in recognition of the suitcases that they used, the 1868 Constitution is often referred to as the "Carpetbag Constitution." For an assessment of the carpetbaggers, see Maurice M. Vance, *Northerners in Late Nineteenth Century Florida: Carpetbaggers or Settlers?*, 38 FLA. HIST. Q. 1 (1959).

95. Although little attention had been paid to flags prior to the war, the conflict served to elevate the place of flags in the minds of most Americans. Thus, for example, when the Ku Klux Klan was founded in 1867, one of the first things it did was adopt a flag. Seeking to set itself apart from the numerous other groups that were forming in the post-war South, the Klan's flag consisted of a yellow triangle with a red scalloped border and bore a black dragon and the Klan's motto. SMITH, FLAG BOOK, *supra* note 10, at 274.

96. FLA. CONST. art. XVI, § 31 (1868).

97. Although seals had been used throughout Florida's history, no official seal had ever been adopted. Prior to 1821, the Spanish or English seal was used in Florida depending on which country was in power. From 1821 until 1846, a seal bearing an American eagle with outstretched wings resting on a bed of clouds and ringed with the words "The Territory of Florida" was employed. After 1846, a seal depicting an outline map of Florida and the sitting figure of a woman holding her hand out in the direction of the Gulf of Mexico was utilized. For a further description of the Spanish and British seals, see Robert R. Rea, *The Deputed Great Seal of British West Florida*, 40 ALA. HIST. Q. 162 (1978), and Peter Walne, *The Great Seals Deputed of British East Florida*, 61 FLA. HIST. Q. 49 (1982). For a further description of the American seals, see MORRIS, *supra* note 10, at 284-87.

98. Dodd, *supra* note 51, at 169. According to the description contained in the resolution, the seal was to be "the size of the American silver dollar," and was to have "in

Reconstruction ended in 1877 with the election of Rutherford B. Hayes as president, and like other Southern states, Florida set out to eradicate all vestiges of Northern control and influence.<sup>99</sup> This attempt reached its zenith in 1885, when an entirely new constitution was adopted to replace the 1868 constitution.<sup>100</sup> Like the 1868 constitution, however, the 1885 constitution provided that the state flag was to be a field of white with the state seal in the middle.<sup>101</sup>

The next change in the flag's design occurred just as the century was coming to an end. Whenever the flag would hang limp, such as on windless days, it appeared to be completely white.<sup>102</sup> Since white flags always have stood for surrender,<sup>103</sup> late in the century Governor Francis P. Flem-

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the centre thereof a view of the sun's rays over a highland in the distance, a cocoa tree, a steamboat on water, and an Indian female scattering flowers in the foreground, encircled by the words: 'Great Seal of the State of Florida: In God we Trust.'" *Id.*

99. For a sense of what Florida was like during Reconstruction, see Jerrell H. Shofner, *Political Reconstruction in Florida*, 45 FLA. HIST. Q. 145 (1966). In large measure, Reconstruction came to an end because the Florida State Board of Elections decided to award Florida's electoral votes to Rutherford B. Hayes, the Republican nominee, in the disputed presidential election of 1876. Modern-day historians are in agreement that the election actually was won by Samuel J. Tilden. See further Jerrell H. Shofner, *Florida Courts and the Disputed Election of 1876*, 48 FLA. HIST. Q. 26 (1969), and Jerrell H. Shofner, *Florida in the Balance: The Electoral Count of 1876*, 47 FLA. HIST. Q. 122 (1968).

100. See Edward C. Williamson, *The Constitutional Convention of 1885*, 41 FLA. HIST. Q. 116 (1962).

101. FLA. CONST. art. XVI, § 12 (1885).

102. This visual effect should have been anticipated, since a similar problem had been encountered during the Civil War. As noted above, see *supra* notes 84-85 and accompanying text, the original Confederate flag was the Stars and Bars. On May 1, 1863, however, the Confederacy replaced the Stars and Bars with a new flag known as the "Stainless Banner." This flag had a white field and contained the Southern Cross in its canton. Because the Stainless Banner often was mistaken for a flag of surrender when no breeze was blowing, a red vertical stripe was added to its fly on March 4, 1865. See further CANNON, *supra* note 80, at 14-24.

103. SMITH, *ACROSS THE WORLD*, *supra* note 8, at 97. Although no harm is supposed to come to a person proceeding under a white flag, one's protection is by no means guaranteed. History has recorded numerous incidents in which a flag of truce either was ignored or used to stage an ambush, and Floridians need look no further than their own state for such an episode.

In 1832, President Andrew Jackson ordered the forcible relocation of the Seminoles from Florida to Oklahoma. Jackson harbored a strong antipathy for the tribe as a result of his participation in the First Seminole War (1817-18), and therefore was quite willing to oblige the white settlers in Florida who were clamoring for the Seminoles' land. Jackson's decision to remove the Seminoles touched off the Second Seminole War (1835-42), a bloody confrontation that eventually cost \$20 million and claimed at least 1,500 lives. During the

ing<sup>104</sup> recommended that a red saltire be placed behind the seal.<sup>105</sup> In 1899, the Legislature responded to Fleming's suggestion by passing a joint resolution proposing that the constitutional description of the flag be changed to include a red saltire.<sup>106</sup> On November 6, 1900, the amendment was approved by the voters.<sup>107</sup>

## VI. THE TWENTIETH CENTURY

Although no major changes have been made in the flag during the twentieth century, three small modifications have taken place. First, on November 8, 1966, a constitutional amendment was passed reducing the

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early years of the fighting, the Seminoles were led by a Creek warrior named Osceola. His brilliant tactics and ability to elude capture completely frustrated the United States Army, and finally led Major General Thomas S. Jesup to invite Osceola to a peace conference near Saint Augustine in October 1837. Although Osceola arrived carrying a white flag, Jesup had him imprisoned, first at the Castillo de San Marcos in Saint Augustine, and later at Fort Moultrie in Charleston, South Carolina, where he died on January 30, 1838. Despite a public outcry and a Congressional investigation, Jesup was not punished, although his reputation suffered permanent damage and he spent much of the rest of his life defending his actions. For a further description of the affair, see *The White Flag*, 33 FLA. HIST. Q. 218 (1955). See also PATRICIA R. WICKMAN, OSCEOLA'S LEGACY (1991).

104. Fleming served as governor of Florida from January 8, 1889 to January 3, 1893. Born in Panama Park, Florida, on September 28, 1841, Fleming served in the famous 2d Florida Regiment during the Civil War. While home on sick leave, he commanded a company of volunteers at the Battle of Natural Bridge. After the war he studied law, gained statewide prominence, and entered politics. As governor, Fleming is best remembered for having set up the State Board of Health and charging it with suppressing Yellow Fever. He died on December 20, 1908 in Jacksonville. Sobel & Raimo, *supra* note 50, at 261.

105. SMITH, FLAG BOOK, *supra* note 10, at 126. Although it is not known why Fleming proposed adding a red saltire, the generally-accepted theory is that he got the idea from the recently-adopted Alabama state flag. During the Civil War Alabamians had used a modified version of the Bonnie Blue flag as their state flag. See *supra* note 44. In 1895, this flag was replaced by an entirely new design:

The present State flag [of Alabama] was adopted by the Legislature on 16 February 1895 in accord with a motion introduced by Representative John W. A. Sanford, Jr. It is described as having a "crimson cross of St. Andrew," although St. Andrew's saltire has in fact always been white. . . . The proportions are not specified, but since the intention of the creator was to suggest the Battle Flag of the Confederacy, the flag should be made square in shape.

*Id.* at 102. Given the fact that less than four years separate the adoption of the Alabama flag and Fleming's proposal, the theory seems well-founded.

106. See 1899 FLA. LAWS, J. Res. No. 4, at 359.

107. SMITH, FLAG BOOK, *supra* note 10, at 126.

dimensions of the flag to conform to standard commercial sizes.<sup>108</sup> Second, on May 21, 1985, the state seal was changed to correct a number of historical inaccuracies.<sup>109</sup> Finally, as part of the 1968 revision of the constitution, the description of the flag was deleted.<sup>110</sup> Consequently, the constitution now simply provides that the design of the flag "shall be prescribed by law."<sup>111</sup>

Today, in addition to the state flag, many other flags regularly appear in Florida. Among the most common are the red-and-white diver's flag,<sup>112</sup> the red-and-black hurricane flag,<sup>113</sup> and the blue-and-gold flag

108. This change was necessitated because "the proportions of three to four which were selected for the flag in 1900 did not correspond to those generally in use for other state flags. Thus on 8 November 1966 a further amendment was ratified, specifying a greater flexibility in the proportions of the flag, the width of the seal, and the saltire." *Id.* Although the change made little difference to the public, it was greeted with great enthusiasm by flagmakers: "The former size of the Florida flag had presented a problem to flagmakers, who were being called upon to furnish Florida flags in ever increasing number because of legislative requirements for its display at school and other public buildings." MORRIS, *supra* note 10, at 280.

109. *Id.* at 284. Among the errors found in the old seal were the following: "a bag of coffee, never a prime crop in Florida; a cocoa palm instead of the state's Sabal (Palmetto) palm; an Indian maiden dressed as a Plains Indian, mountains in a state where the highest elevation is 345 feet, and questionable seaworthiness of the sidewheel steamer." *Id.* Although no one knows how these anomalies crept into the seal, "[t]here is an unconfirmed story that a Northern designer modified for Florida a seal previously prepared for use by a government in the West." *Id.* at 286. For a further discussion of the errors contained in the 1868 seal, see *Florida's Great Seal: Its Historical Inaccuracies*, 3 FLA. HIST. Q. 16 (1924).

110. Some legislators wanted to go further, and argued that the constitution should not mention the flag at all. See, e.g., Talbot "Sandy" D'Alemberte, *Commentary*, 25A FLA. STAT. ANN. 504 (1970).

111. See *supra* note 1. At the same time, chapter 15 of the Florida Statutes was amended to include the following description of the flag: "The seal of the state, in diameter one-half the hoist, shall occupy the center of a white ground. Red bars, in width one-fifth the hoist, shall extend from each corner toward the center, to the outer rim of the seal." FLA. STAT. § 15.012 (1991).

112. The diver's flag, consisting of a white diagonal stripe on a red field, "warns of diving in the area where it is displayed[.]" SMITH, FLAG BOOK, *supra* note 10, at 275. In Florida, all divers are required to "prominently display a divers-down flag in the area in which the diving occurs, other than when diving in an area customarily used for swimming only." FLA. STAT. § 861.065(4) (1991).

The desire of commercial dive shops to fly the diver's flag in front of their stores has spawned an interesting situation in Fort Lauderdale and other Broward County cities. Under the zoning ordinances of both the County and the various municipalities, the use of commercial banners, including flags, is illegal. See, e.g., FORT LAUDERDALE, FLA., II CODE § 47-50.3(c) (1990). Governmental flags, however, are exempt from the prohibition. *Id.* § 47-50.3(c)(5). Some years ago, dive shop owners discovered that the flag of the Brazilian



of the Conch Republic.<sup>114</sup> Other often encountered flags are foreign flags,<sup>115</sup> municipal and corporate flags,<sup>116</sup> and the deeply moving black-and-white P.O.W.-M.I.A. flag.<sup>117</sup> By far, however, the most popular flag

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state of Para looks exactly like the diver's flag, except that it adds a blue star to the middle of the white horizontal stripe. MAURO TALOCCI, GUIDE TO THE FLAGS OF THE WORLD 225 (rev. ed. 1982). As a result, the Para flag now can be seen throughout Broward County.

113. The hurricane flag is actually two identical flags flown one above the other. Each flag is red and has a black square in the middle. When only one such flag is flown, a whole gale rather than a hurricane is indicated. See Whitney Smith, *Flag*, in 11 Encyclopedia Americana 348, illus. opp. 363 (1986). For a look at how hurricanes have shaped the development of Florida, see MORTON D. WINSBERG, FLORIDA WEATHER 111-33 (1990). The legal issues that can be spawned by hurricanes are canvassed in Symposium, *Andrew: Force Majeure—The Legal Aftermath*, 17 NOVA L. REV. 1003 (1993).

114. The Conch Republic was "founded" on April 23, 1980, by residents of Key West to protest a United States Border Patrol road block that turned U.S. Route 1 into a nineteen mile long parking lot. In recent years, the Conch Republic flag, which in actuality is the Key West city flag, has become something of a collector's item. See further Whitney Smith, *The Conch Republic Flag*, 32 FLAG BULL. 49 (1993).

115. Nowhere is this more true than in Coral Gables, where the local chamber of commerce recently convinced the City to permanently display the flags of more than 200 countries in a colorful salute to the city's large international business community. See *Coral Gables Salutes the World*, NEW MIAMI, Oct. 1993, at 8. Although the Cuban, Haitian, and Israeli flags are very prominent in South Florida, on a statewide basis the Canadian Maple Leaf is the most frequently seen foreign flag. It also enjoys the distinction of being the only foreign flag ever to fly over the Capitol:

After the spiriting of six Americans from Tehran by the Canadian Ambassador to Iran in February, 1980, Governor Bob Graham ordered the flying of the flag of Canada from four poles at the Capitol until the hostages then held at the American Embassy in Tehran were freed. The six rescued were those who had escaped when militants took over the Embassy. The Canadian flags were lowered for the last time at noon on January 26, 1981, as bands played and in the presence of dignitaries headed by Governor Graham and of the public.

MORRIS, *supra* note 10, at 281.

116. Since the end of World War II, an increasing number of American counties and cities have adopted their own flags. Most often, such flags depict the government's seal and are displayed in "the chambers of the mayor or the governing council." SMITH, FLAG BOOK, *supra* note 10, at 248-53. Similarly, many corporations today find it advantageous for advertising purposes to have their own flag. Like municipal flags, corporate flags normally bear the company's seal. *Id.* at 271-78. This is not always the case, however, for when Carl Barger, the president of the Florida Marlins baseball team, died shortly before the start of the team's inaugural season, owner H. Wayne Huizenga had a flag bearing Barger's name and his favorite number (5, for legendary Yankee outfielder Joe DiMaggio) raised over Joe Robbie Stadium before the Marlins' first home game. See S. L. Price, *Marlins Don't Make a Move Before Making Sure Barger is Remembered*, MIAMI HERALD, Apr. 6, 1993, at 12D.

117. The P.O.W.-M.I.A. flag, which depicts a prisoner of war in the foreground and a sentry box and barbed wire in the background, was created after the Viet Nam War to honor

in Florida is the Southern Cross.<sup>118</sup> But because many Americans recently have come to the conclusion that this flag promotes racism, the future use of the Southern Cross is in considerable doubt.<sup>119</sup>

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missing soldiers. Since September 19, 1990, the Florida Legislature has required "each state-owned building at which the flag of the United States is displayed [to] also display a P.O.W.-M.I.A. flag[.]" FLA. STAT. § 256.12 (1991).

118. The popularity of the Southern Cross is not limited to just Florida:

Another flag which has been transformed over time is the naval jack of the Confederate States of America. Originally flown only on the prow of ships, since the late nineteenth century it has been displayed extensively on land as an unofficial Southern banner — a kind of national flag of Dixieland, symbolizing adherence to the "Lost Cause" and the principles of racial segregation and "States' Rights." In the North it has also been widely used since World War II by some high school and college students on speedboats, hot rods, motorcycle helmets, in dormitories and similar situations. It is often mistakenly called the Battle Flag or the Stars and Bars. This is the only regional flag now used in the United States, although in the seventeenth and eighteenth centuries New England had its own flag.

SMITH, FLAG BOOK, *supra* note 10, at 273-74.

119. In a recent interview, the owner of a popular flag store in Sunrise, Florida noted that of all the flags he stocks, none is more controversial than the Southern Cross. *See* Beth Feinstein-Bartl, *A World of Flags: Merchant Finds Patriotism Brings Business Success*, SUN-SENTINEL, May 16, 1993, North East, at 6. In Georgia, the debate over the Southern Cross has grown so fierce that many citizens have demanded the governor's resignation. On May 28, 1992, Governor Zell Miller, saying that the flag represented the "dark side of the Confederacy—that desire to deprive some Americans of the equal rights that are the birthright of all Americans[.]" called on the Georgia Legislature to remove the Southern Cross from the state flag, which had been added in 1956 to protest the United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Believing that Miller has turned his back on the state's heritage, many Georgians have taken to sporting bumper stickers and buttons that read "Keep the Flag, Lose the Governor." For a further discussion of the controversy, see Don Melvin, *Scars & Bars*, SUN-SENTINEL, Mar. 7, 1993, at 1G.

Despite Miller's troubles, on April 29, 1993, the new governor of Alabama, Jim Folsom, reversed a longstanding tradition when he prohibited the Southern Cross from being flown from the dome of the capitol. Folsom defended his action by saying: "This has been a divisive issue in our state, and I believe it is time we put it behind us and move our state forward." *See Confederate Flag Banned from Capitol*, MIAMI HERALD, Apr. 30, 1993, at 3A. Encouraged by this action, black leaders in Mississippi have sued to have the Southern Cross removed from their state flag, while black legislators in South Carolina have stepped up their longstanding effort to end the practice of flying the Southern Cross alongside the state flag. *See* Ray Recchi, *'Tradition' Unravels to Reveal Racism*, SUN-SENTINEL, May 3, 1993, at 1D.

The dispute over the Southern Cross reached the national stage in July 1993, when Senator Carol Mosley-Braun, the only black member of the United States Senate, gave a heartfelt speech and thereby singlehandedly persuaded her colleagues not to renew a patent held by the United Daughters of the Confederacy ("UDC"). The patent, which dated back

## VII. CONCLUSION

It has been written that "Flags are fond symbols, popular with people of all ages."<sup>120</sup> As this essay has shown, anyone who likes flags will find Florida an exciting and rewarding place to indulge their passion.

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to 1890, protected a UDC insignia that included the Confederate flag. See Michael Riley, *Nixing Dixie: An Impassioned Senate Vote Focuses Attention on the South's War of Symbols*, TIME, Aug. 2, 1993, at 30.

Braun's speech has inspired partisans on both sides of the controversy, particularly in Florida. While Braun's words encouraged Richard Klos, a white freelance writer, to appear before the Hillsborough County Commission to urge that it remove the Southern Cross from the county seal, see *Hillsborough to Take Rebel Flag Off Seal*, SUN-SENTINEL, Aug. 6, 1993, at 8A, they also caused the Populist Party of Florida to hold a rally in downtown Davie to show support for the flag. See Bob French, *Protesters Support Confederate Flag*, SUN-SENTINEL, Sept. 12, 1993, at 3B. Thus, it appears that the struggle over the Southern Cross in Florida, as well as in other parts of the South, will be a long one.

120. CANNON, *supra* note 80, at 1.

# Is There a Lucky Seven in Florida's Future?

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## I. INTRODUCTION

A jackpot close to eighty thousand dollars awaits one of the many who flock to the Seminole reservation with hopes of picking the lucky eight numbers.<sup>1</sup> Although the Florida Constitution prohibits gambling except for

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1. The Seminole reservation conducts a do-it-yourself bingo whereby a person can win the jackpot if he correctly chooses eight numbers ranging from one to seventy-five, and those

pari-mutuel games<sup>2</sup> and state-run lotteries,<sup>3</sup> approximately twelve hundred persons each night gamble at the Seminole reservation, which offers casino-style entertainment.<sup>4</sup> The Seminoles are a federally recognized tribe and are therefore subject to the plenary power of the federal government. Thus, the State of Florida plays a limited role in regulating the tribe.<sup>5</sup>

In 1988, the Indian Gaming Regulatory Act ("IGRA") was enacted by Congress to provide clear standards for the conduct of gaming on Indian lands.<sup>6</sup> The purpose of IGRA is to promote tribal economic development, self-sufficiency, and a strong tribal government.<sup>7</sup> IGRA has prompted many tribes nationwide, including the Seminole Tribe of Florida, to conduct casino-style gambling operations.<sup>8</sup> However, many casino-style games the tribes wish to operate must first be negotiated under a Tribal-State compact.<sup>9</sup> Presently, the Seminole Tribe of Florida is engaged in litigation against the State of Florida, claiming that the state has violated IGRA by failing to negotiate in good faith.<sup>10</sup> In *Seminole Tribe of Florida v.*

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numbers are called before the twenty-first number has been selected.

2. FLA. CONST. art. X, § 7.

3. *Id.* art. X, § 15.

4. The Seminoles offer 162 electronic video machines. The electronic machines include modern-style slot machines and Superpick Lotto. Superpick Lotto is played by choosing six numbers ranging from zero to nine; if at least two of the player's numbers correspond to the numbers displayed by the machine, the player receives credits which can be exchanged for money. The video machines carry a jackpot close to \$21,000. Furthermore, the Seminoles offer high-stakes bingo. A regular session of bingo consists of twenty games which offer a prize to a single winner as high as \$1199. (The above statistics are based on personal observations of the author.)

5. See 25 U.S.C. § 1901 (1988).

6. See *id.* § 2702.

7. *Id.* § 2702(1).

8. Tom Davidson & Bob French, *Support for Casino Gambling, Bingo Evident at Tribal Powwow*, SUN-SENTINEL, Jan. 10, 1992, at B1. Since IGRA, there have been at least 23 casino-style operations opened. *Id.* In 1992, there were at least 140 Indian gambling operations in business in the United States, which were estimated to bring in \$1.3 billion dollars in revenue. *Id.*

9. 25 U.S.C. § 2710(d)(1)(C) (1988). Furthermore, the United States Code provides: Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations . . . of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

*Id.* § 2710(d)(3)(A).

10. See *Seminole Tribe of Fla. v. State*, No. 91-6756, 1993 WL 475999, at \*1 (S.D. Fla. Sept. 22, 1993).

*State*,<sup>11</sup> the parties disagree as to which games are permitted by the state and are thereby negotiable under the Tribal-State compact.<sup>12</sup> The state maintains that "slot machines" are not negotiable under the compact because Florida law does not permit such machines to be operated within the state.<sup>13</sup> The tribe asserts that the machines are in fact permitted within the state, and are therefore negotiable under the compact.<sup>14</sup> Meanwhile, the Seminoles continue to offer the electronic gambling machines at the reservation despite the absence of a Tribal-State compact.

Indian gaming plays an interesting role in the development of gambling in Florida. This article examines the history of gambling in Florida, including the undertaking of illegal gambling, the corruption of law enforcement agencies, and the subsequent changes to the Florida Constitution due to changing public opinion. This article also explores the emergence of Indian gaming in Florida, the federal enactments pertaining to tribes, and a particular decision of the United States District Court for the Southern District of Florida which held in favor of the state. Finally, this article discusses the future of gaming in Florida and the probable outcome of full-scale casino gambling within the state.

## II. FLORIDA'S GAMBLING HISTORY

In the early 1800's, lotteries were common in many states as a means of raising revenue.<sup>15</sup> In 1828, the territorial legislature of Florida created Union Academy in Jacksonville, and authorized its trustees to raise revenue by conducting a lottery.<sup>16</sup> However, lotteries were short-lived in Florida when the Legislature, in 1832, enacted the first statute pertaining to gambling. This statute prohibited and punished the playing and betting of

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11. *Id.*

12. *Id.* Under the IGRA, class III gaming activities include banking card games, electronic facsimiles of any game of chance, or slot machines. 25 U.S.C. § 2703(8) (1988). In order for class III games to be lawful, the activities must be authorized by an ordinance adopted by the governing body of the tribe, meet approval by the Chairman of the National Indian Gaming Commission, and be an activity which is located within a state that permits it by any person, organization, or entity. *Id.* § 2710(d)(1).

13. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*1.

14. *Id.*

15. *Greater Loretta Improvement Ass'n v. State*, 234 So. 2d 665, 667 (Fla. 1970). In 1823, Maryland authorized a state lottery for the purpose of raising revenue for Washington College, a statue of George Washington, and turnpike roads. *Id.*

16. *Id.*

any game of cards, dice, checks, billiards, or any other instrument used for the purpose of betting.<sup>17</sup> Furthermore, even though lotteries had proven to be a worthwhile source of revenue for the creation of many educational institutions,<sup>18</sup> a large number of states, including Florida, instituted constitutional bans against state lotteries.<sup>19</sup> In 1885, Florida's Constitution provided that "the authorization of lotteries by the legislature is inhibited, and the sale of lottery tickets shall not be allowed."<sup>20</sup> This lottery prohibition, according to the Florida Supreme Court, was in response to the widespread infestation that the lottery preyed upon the hard earnings of the poor.<sup>21</sup> The prohibition against lotteries accomplished its intended goal of morality for a while, but a much stronger force brought the Legislature to a realization; the Great Depression and failing tourism were debilitating state revenue.

In 1931, Florida legalized pari-mutuel betting on horses, which guaranteed state and local governments millions of dollars of revenue to help relieve the paralyzation of the Depression.<sup>22</sup> The Legislature had become by that time a full-fledged partner in the gambling business by authorizing track-run betting pools and taking cuts off the top.<sup>23</sup> The

17. *Lee v. City of Miami*, 163 So. 486, 490 (1935).

18. Marc Fisher, *Gambling Goes Way Back Moses, Jefferson Indulged*, MIAMI HERALD, May 18, 1986, at 24A. The proceeds from lotteries helped pay for the renovation of Faneuil Hall in Boston and for the establishment of Harvard, Yale, and Dartmouth colleges in the early seventeenth century. *Id.*

19. By 1885, 29 state constitutions had prohibited lotteries. *See, e.g.*, ARK. CONST. art. V, § 41 (1868); FLA. CONST. art. III, § 23 (1885); IOWA CONST. art. III, § 28 (1857); MICH. CONST. art. IV, § 27 (1850); N.J. CONST. art. VII, § 2 (1844); R.I. CONST. art. IV, § 12 (1842); TENN. CONST. art. XI, § 5 (1834); WIS. CONST. art. IV, § 24 (1848).

20. FLA. CONST. art. III, § 23 (1885).

21. *Lee*, 163 So. at 489.

22. *See* ch. 14832, 1931 Fla. Laws 679. According to the First Research Corporation, "the state's desire for a new source of revenue so desperately needed overshadowed any moralistic concept that this taxation would serve as a control for some sort of unwanted gaming thought distasteful to the citizenry." FLORIDA RESEARCH CORP., STUDY OF THE PARIMUTUEL INDUSTRY: STATE OF FLA. 4 (1968). The legislation stipulated that each of the 67 counties would share equally in the revenue derived from pari-mutuel racing. *Id.* Today the games contribute over \$105 million to the state. 1992 FLA. DEP'T OF BUS. REG., DIV. OF PARI-MUTUEL WAGERING ANN. REP. 33.

23. John D. McKinnon, *Legislature Seems Ready to Take a Chance*, ST. PETERSBURG TIMES, Nov. 12, 1991, at B1.

In the fiscal year 1931-1932, state revenue from pari-mutuel racing amounted to \$737,301, or 4.25% of the total pari-mutuel handle. 1992 FLA. DEP'T OF BUS. REG., DIV. OF PARI-MUTUEL WAGERING ANN. REP. 33. Total paid attendance at the pari-mutuel games was 1,157,161 through 462 racing days. *Id.* This figure steadily increased, as did the

legalization of pari-mutuel racing was not only an answer for the much needed revenue, but was also an indication of what the public desired. However, the legalization of horse racing neither fulfilled the public's hunger for gambling entertainment nor solved Florida's revenue problems. As a result, the Legislature in 1935 legalized slot machines.<sup>24</sup>

Although slot machines existed throughout the state prior to legalization, the state was now in a position to regulate their use and derive revenue from their operation. Nonetheless, two years later the law was repealed.<sup>25</sup> Slot machines had proven to be an attraction to tourists and a worthwhile source of revenue to Floridians. Consequently, illegal gambling enterprises flourished in South Florida.<sup>26</sup>

Illegal gambling was considered a solution to the plight brought to South Florida by the bust of the land boom in 1925, the hurricane destruction in 1926 and 1928, the stock market crash of 1929, and the Great Depression.<sup>27</sup> Local politicians and law enforcement agencies protected the illegal operations in order to bolster tourism and satisfy their constituents.<sup>28</sup>

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number of racing days. *Id.* In 1946, the total state revenue from the pari-mutuel wagering soared to \$15,554,034, or 7.35% of the handle. *Id.* Furthermore, the racing days amounted to 1442 with 4,448,084 in paid attendance. *Id.* Since legalizing pari-mutuel wagering, over one-half billion people have attended the games, which translates into \$2,920,064,124 dollars of revenue collected by the state. 1992 FLA. DEP'T OF BUS. REG., DIV. OF PARI-MUTUEL WAGERING ANN. REP. 33.

24. See ch. 17257, 1935 Fla. Laws 1085 (repealed 1937). The law permitted the operation of automatic coin-operated vending "slot machines" and required the person intending to set up operation of the device to obtain a license. *Id.* The reason for the legalization of the "slot machines," according to Carl W. Burnett, a representative of Madison County, was the realization that "slot machines [were] here and nobody [had] been able to stop them and we can get revenue from them under this bill." FLA. HOUSE OF REP. J. 981 (May 21, 1935) (statement by Carl W. Burnett, Rep. Madison).

25. See ch. 18143, 1937 Fla. Laws 909.

26. Dan Ray, *Sheriff Was a Sure Bet*, MIAMI HERALD, Nov. 18, 1985, at C1. In Dade County, the S&G syndicate operated a series of bookmaking houses, while in Palm Beach County, the Beach Club was known to attract the wealthy to its gaming tables. *Id.* Broward County housed many casino operations: the Colonial Inn, the Lopez Restaurant, the Casa Grande in Hallandale, the Club Greenacres, the It Club near Port Everglades, and the Valhalla Club in Hollywood. *Id.*

27. *Id.*

28. See *id.* Walter R. Clark, Broward County Sheriff from 1933 to 1950, was part-owner of a slot machine company and permitted the illegal casino operations to flourish throughout South Florida. Ray, *supra* note 26, at C1. Clark maintained that he looked the other way because he was "elected on the liberal ticket, and the people want it [casinos] and they enjoy it." *Id.* J.B. Wiles Jr., a county commissioner from 1941 to 1949, commented on the authorities who authorized the illegal gambling, and stated that "they were running the



However, casino gambling in South Florida soon came to an end in 1950 when the United States Senate Hearings, conducted by Estes Kefauver of Tennessee, informed the nation of South Florida's illegal gambling operations and exposed its governmental corruption.<sup>29</sup> The Kefauver committee hearings led to the shutdown of South Florida casinos in 1950.<sup>30</sup>

Although illegal casinos had been effectively closed by Kefauver and South Florida's economy had made a steady recovery, the public's pursuit of legalized gambling still had not subsided. Consequently, with the passage of the 1968 Constitution, Florida's tight grip on prohibiting lotteries had weakened. Pari-mutuel pools, which included horse racing, dog racing, and jai-alai, were now permitted within the state.<sup>31</sup> Shortly thereafter, Florida again weakened its stand against gambling when the pari-mutuel games, permitted under article X, section 7 of the Florida Constitution, were now extended to include bingo. This extension was the result of an interpretation of the constitution by the Florida Supreme Court in *Greater Loretta Improvement Ass'n v. State*.<sup>32</sup> The supreme court concluded that the same legislature that passed the bingo statute<sup>33</sup> and that permitted certain charitable, nonprofit organizations to conduct bingo games was instrumental in the writing and passage of the 1968 constitution.<sup>34</sup> Therefore, the court concluded, bingo must have been included with horse racing, dog racing, and jai-alai as exceptions to the lottery prohibition.<sup>35</sup> The court's determination to declare the bingo statute constitutional came in response to changing public opinion in favor of legalized gambling in Florida.<sup>36</sup>

Over the next decade, the public's desire for legalized gambling was evident by its repeated attempts to amend the Florida Constitution by

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county in line with the thinking of the people of Broward County at the time." *Id.*

29. *Id.* Kefauver's committee took aim at ending corruption in government; the United States Senate Hearings exposed Sheriff Clark who was subsequently removed from office and indicted on gambling and tax evasion charges. *Id.* He was ultimately acquitted. Ray, *supra* note 26, at C1.

30. *Id.*

31. See article X, section 7 of the Florida Constitution which provides: "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state." FLA. CONST. art. X, § 7.

32. 234 So. 2d 665, 671 (Fla. 1970).

33. See FLA. STAT. § 849.093 (1991) (repealed 1992).

34. *Loretta*, 234 So. 2d at 670-71.

35. *Id.* at 671.

36. *Id.* at 672. The court determined that the moral issue concerning bingo is a matter of legislative concern; therefore, the court relied upon the fact that the Legislature, which was "directly responsible to the people," had legalized pari-mutuel pools, which included bingo. *Id.*

initiative.<sup>37</sup> Although Florida may not have been prepared to permit casino gambling within the state by 1986, the public was more than ready to permit a state-run lottery for education. On November 4, 1986, a proposal to authorize a state-run lottery was placed on the ballot for general election<sup>38</sup>

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37. Article XI, section 3 of the Florida Constitution provides the public with the means of revising or amending the state constitution by initiative. A petition containing a copy of the proposed amendment must be signed by a number of electors in each of one-half of the congressional districts of the state. Of the state as a whole, the number of signatures must be equal to eight percent of the votes cast in each of the respective districts in the last preceding election in which presidential electors were chosen. FLA. CONST. art. XI, § 3.

In 1978, a proposed amendment to permit casinos on Miami Beach was placed on the statewide ballot. Article X, section 15 of the Florida Constitution would have provided:

Casino Gambling: The operation of state regulated privately owned gambling casinos is hereby authorized only within the following limited area:

That area of Dade and Broward Counties, Florida, bounded on the East by the Atlantic Ocean; on the West by the centerline of . . . Collins Avenue from its intersection with 5th Street southerly to Biscayne Street and the southerly prolongation of the centerline of Collins Avenue to an intersection with the centerline of Government Cut; bounded on the South by the centerline of Government Cut; and bounded by the North by the North line of Lot 1, Block 14, Beverly Beach, according to the Plat thereof recorded in Plat Book 22, Page 13, Broward County Records.

*Floridians Against Casino Takeover v. Let's Help Fla.*, 363 So. 2d 337, 338 (Fla. 1978).

The plan was defeated in large part by then-governor Reubin Askew; the vote was 71% to 29% against casinos. Paul Anderson, *New Pro-Gambling Drive Kicks Off Soon*, MIAMI HERALD, June 23, 1983, at B6. In 1980 and 1984, Charles Rosen, president of Florida Casinos Inc., initiated drives to legalize casinos in Florida, but was unsuccessful in placing the proposal on the ballot. *Id.*

In 1986, a proposal to allow individual counties to determine whether to permit casino gambling was placed on the ballot, but was defeated by 68.4% of the voters. William L. Leary, *The Florida Lottery Act*, 15 FLA. ST. U. L. REV. 731, 732 n.12 (1987).

38. Leary, *supra* note 37, at 732. Ralph Turlington, former Commissioner of Education, was responsible for and succeeded in obtaining the required number of signatures necessary for the proposal to appear on the ballot in the general election. *Id.* The proposed amendment to article X read as follows:

Section 15. State Operated Lotteries.—

a) Lotteries may be operated by the State.

b) If any subsections of the Amendment to the Florida Constitution are held unconstitutional for containing more than one subject, this Amendment shall be limited to subsection (a) above.

c) This amendment shall be implemented as follows:

1) Schedule - On the effective date of this Amendment, the lotteries shall be known as the Florida Education Lotteries. Net proceeds derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education Lotteries Trust Fund, to be appropriated by the Legislature. The schedule may be amended by general law.

and was overwhelmingly adopted by the citizens of Florida.<sup>39</sup>

Indicative of the public's desire to gamble, the Florida lottery set national sales records within the first twenty-four hours of operation,<sup>40</sup> and since its inception, the lottery has brought in much needed revenue with Dade and Broward Counties leading the state in sales.<sup>41</sup> Recently, however, the lottery has declined in sales.<sup>42</sup> Legislative revenue forecasters maintain that the public's interest in the lottery has peaked.<sup>43</sup>

In 1986, the state lottery may have temporarily fulfilled the public need for gambling entertainment, but recent public interest in the lottery has dulled.<sup>44</sup> When the enthusiasm for horse racing dwindled in the 1930's, the public turned to illegal gambling for excitement. Today, Floridians have lost interest in the state lottery and have turned their attention towards a new gambling enterprise: casino gambling on Indian reservations.<sup>45</sup>

### III. FLORIDA INDIAN GAMING AND REGULATIONS BEFORE IGRA

The Florida Seminoles own more than 200,000 acres in South Florida;

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*Id.* at 732 n.9.

39. *Id.* The general election revealed that 2,039,437, or 63.5% of the total 3,208,295 votes were cast in favor of the proposed amendment authorizing a state-run lottery. *Id.* at 732 n.11.

40. Scott G. Campbell, *Year Later, State Not Nearly Spent on Lottery*, PALM BEACH POST, Jan. 8, 1989, at A1. The Florida Lottery began operation on January 12, 1988. *Id.* National records were set when Floridians purchased about \$20 million in tickets within the first 24 hours and about \$95 million by the end of the first week. *Id.* In its first year of operation, the lottery was played by almost 72% of the state's households, amounting to approximately \$1.6 billion spent. *Id.*

41. *Fast Facts: Lotto's Sales*, SUN-SENTINEL, May 13, 1993, at B1. Since January 12, 1988, the Florida Lottery has sold \$10.7 billion worth of tickets, with \$160,121,038.00 and \$99,343,993.50 coming from Dade and Broward Counties respectively, constituting most of the sales in the state. *Id.* Over the five year period, sales from the lottery have generated \$3 billion for education, with 70% going to public schools kindergarten through twelfth grade, 12% going to community colleges, and 15% going to public universities. Linda Kleindienst, *On-Line Lottery Pays \$5 Billion in 5 Years*, SUN-SENTINEL, Apr. 29, 1993, at A12.

42. *Lottery's Earning Power Slips After 5 Years*, SUN-SENTINEL, July 18, 1993, at A13. Florida Lottery sales have dropped from \$2.22 billion in the 1991-92 fiscal year to \$2.17 billion in 1992-93 fiscal year. *Id.*

43. *Id.*

44. *See id.*

45. *See generally* Don Van Natta, *U.S., Tribe at Odds Over Game*, MIAMI HERALD, Nov. 29, 1991, at B1.

however, because most of the land is not productive, the tribe's ability to generate income is limited.<sup>46</sup> In 1934, Congress passed the Wheeler-Howard Bill,<sup>47</sup> better known as the Indian Reorganization Act, which sought to protect the land base of the tribes and enable them to create their own governments.<sup>48</sup> In 1935, the Wheeler-Howard Bill went into effect,<sup>49</sup> and although not important to the Seminoles at the time, the Act exempted the tribe from paying state and local taxes.<sup>50</sup> This exemption has led the tribe to conduct various money-making operations on their land,<sup>51</sup> including the first high-stakes bingo operation in the country.<sup>52</sup> Although the state authorizes certain charities to conduct bingo games, high-stakes operations are prohibited.<sup>53</sup> In *Greater Loretta Improvement Ass'n v. State*,<sup>54</sup> the Florida Supreme Court determined the constitutionality of Florida's charitable bingo statute<sup>55</sup> and provided the reasoning which ultimately enabled the Seminoles to engage in high-stakes bingo operations.<sup>56</sup>

#### A. *Greater Loretta Improvement Ass'n v. State*

In 1967, the Florida Legislature enacted section 849.093 of the Florida Statutes, which permits certain charitable, nonprofit organizations to conduct bingo games.<sup>57</sup> In *Greater Loretta Improvement Ass'n v. State*,<sup>58</sup> the

46. James C. Clark, *An Unpopular Act Became a Boon to the Seminoles*, ORLANDO SENTINEL, May 17, 1992, Florida at 8. During the 1800's, the Seminoles survived by hunting and fishing in the Everglades; however, the Seminoles were deprived of a valuable part of their holdings when a project to drain the Everglades began in 1906. *Id.*

47. 25 U.S.C. § 461 (1988).

48. See Florida Dep't of Business Reg. v. United States Dep't of Interior, 768 F.2d 1248, 1256 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

49. Clark, *supra* note 46, at 8. Unless tribes voted not to be included, the act was to go into effect in 1935. *Id.* Out of the 500 eligible voters in Florida, only 21 went to the polls. *Id.* The voters unanimously voted for the measure despite the discouragement from tribal leaders. *Id.*

50. *Id.*

51. Clark, *supra* note 46. In the 1970's, the Seminoles initiated the tax-free sale of cigarettes. *Id.*

52. See 133 CONG. REC. s2241 (daily ed. Feb. 19, 1987).

53. See FLA. STAT. § 849.093 (1991) (repealed 1992). Presently, Florida authorizes charitable bingo. See FLA. STAT. § 849.0931 (Supp. 1992).

54. 234 So. 2d 665 (Fla. 1970).

55. See *id.*

56. *Id.*; see also Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310, 314 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

57. FLA. STAT. § 849.093 (1991) (repealed 1992).

58. 234 So. 2d 665 (Fla. 1970).

Florida Supreme Court was faced with the issue of whether the bingo statute was constitutional under the prohibition against lotteries contained in the 1885 and 1968 constitutions.<sup>59</sup> The court reasoned that when the Legislature imposed a license tax on certain gaming in 1879, including the bingo-like game of "keno,"<sup>60</sup> the Legislature had legalized the game by making it a source of revenue for the state.<sup>61</sup> This reasoning was upheld when the exact language of the anti-lottery provision of the 1868 constitution was written into the new constitution in 1885.<sup>62</sup> Therefore, the court determined "[s]ince the Florida Legislature was empowered in 1879 to legalize and license the bingo-like game of keno, it was empowered in 1967 to legalize bingo. Precedent commands this conclusion."<sup>63</sup> The supreme court concluded the bingo statute<sup>64</sup> was not in violation of the constitutional provision prohibiting lotteries.<sup>65</sup> Bingo became another type of parimutuel pool permitted by the state under Florida's Constitution article X, section seven.<sup>66</sup> This decision proved instrumental in *Seminole Tribe of Florida v. Butterworth*,<sup>67</sup> which provided the Seminoles with the authority to conduct high-stakes bingo operations.<sup>68</sup>

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59. *Id.* The 1885 constitution provided for the prohibition of lotteries within the state, while the 1968 constitution provides for the prohibition of lotteries with the exception of parimutuel pools authorized by law. FLA. CONST. art. III, § 23 (1885); FLA. CONST. art. X, § 7.

60. Keno is a game which is played and won by a player when he or she has five numbers in a row on a card purchased by him or her corresponding with numbers on balls, drawn from a globe, or other receptacle. *Greater Loretta Improvement Ass'n*, 234 So. 2d at 668 [hereinafter "Loretta"].

61. *Id.* at 669. The Supreme Court relied upon an earlier decision which held that the Legislature did have the power to impose a license tax on this game resembling bingo, and as a result, the game was now legalized. See *Overby v. State*, 18 Fla. 178 (1881). *Overby* was later verified by the Legislature when it expressly repealed all laws in conflict with its licensing statute. See *Loretta*, 234 So. 2d at 669.

62. *Loretta*, 234 So. 2d at 669.

63. *Id.*

64. FLA. STAT. § 849.093 (1979) (repealed 1992).

65. *Loretta*, 234 So. 2d at 671.

66. *Id.* Article X, section 7 of the Florida Constitution reads: "Lotteries, other than the types of pari-mutuel pools authorized by law . . . are hereby prohibited in this state." FLA. CONST. art. X, § 7.

67. 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

68. See *id.*

### B. *Seminole Tribe of Florida v. Butterworth*

In 1979, the Seminoles were offering bingo prizes of \$10,000 as well as new cars<sup>69</sup> despite the existence of a state law limiting bingo prizes to \$100.<sup>70</sup> Subsequently, Sheriff Butterworth's attempt to prevent Seminole gaming by enforcing the bingo statute was circumvented in *Seminole Tribe of Florida v. Butterworth*.<sup>71</sup> The Seminoles sought to permanently enjoin the Sheriff of Broward County from enforcing Florida's bingo statute<sup>72</sup> on Indian Land.<sup>73</sup> The tribe had just constructed a \$900,000 bingo hall, which was in operation six days per week and delivering jackpots unquestionably in violation of the bingo statute.<sup>74</sup> Florida sought to prevent the Seminoles from violating the statute by exercising criminal jurisdiction over the tribe pursuant to Public Law 280.<sup>75</sup> The Fifth Circuit, relying on the Supreme Court case of *Bryan v. Itasca County*,<sup>76</sup> determined that states do not have

69. Clark, *supra* note 46.

70. *Id.* Section 849.093 of the Florida Statutes, which was repealed in 1992, stipulated that:

(4) The number of days during which such organizations as are authorized hereunder may conduct bingo or guest games per week shall not exceed two.

(5) No jackpot shall exceed the value of \$100 in actual money or its equivalent, and there shall be no more than one jackpot in any one night.

(6) There shall be only one prize or jackpot on any one day of play of \$100. All other game prizes shall not exceed \$25.

(7) Each person involved in the conduct of any bingo or guest game must be a resident of the community where the organization is located and a bona fide member of the organization sponsoring such game and shall not be compensated in any way for operation of said bingo or guest game.

FLA. STAT. § 849.093 (1979) (repealed 1992).

71. 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

72. *See* FLA. STAT. § 849.093 (1991) (repealed 1992).

73. *Butterworth*, 658 F.2d at 311.

74. *Seminole Tribe of Fla. v. Butterworth*, 491 F. Supp. 1015, 1016-17 (S.D. Fla. 1980).

75. *Butterworth*, 658 F.2d at 313. Public Law 280 conferred criminal and civil jurisdiction on six named states which included: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *See* 18 U.S.C. § 1162(a) (1988); 28 U.S.C. § 1360(a) (1988). Furthermore, since Public Law 280 authorized all other states to assume such jurisdiction over Indian country if they chose, Florida obtained civil and criminal jurisdiction in 1961. *See* FLA. STAT. § 285.16 (1991).

76. 426 U.S. 373 (1976). The United States Supreme Court determined that Public Law 280 granted civil jurisdiction to the states only to the extent necessary to resolve private disputes among Indians and between Indians and private citizens. *Id.* at 383. Utilizing legislative history, the Court determined Public Law 280 does not give states general regulatory powers over the Indian tribes because if Congress had intended to provide the states with the power, it would have expressly said so. *Id.* at 390.

general regulatory powers over Indian tribes under Public Law 280. According to the *Butterworth* court, in order to apply Florida's bingo statute to the Seminoles, the bingo statute would have to be criminal/prohibitory in nature, and not merely civil/regulatory.<sup>77</sup> Since the Florida Supreme Court, in *Loretta*, had previously determined that the bingo statute did not violate the Florida Constitution,<sup>78</sup> and the Legislature has "seen fit to permit bingo as a form of recreation . . . but has chosen to regulate by imposing certain limitations to avoid abuses,"<sup>79</sup> the court held the playing of bingo was not against public policy, and therefore, was regulatory in nature.<sup>80</sup>

This authorization of high-stakes bingo on the Seminole reservation triggered the rapid increase in Indian gaming enterprises across the country;<sup>81</sup> Native Americans had found a way to raise revenue and to replace the lost federal aid desperately needed to build schools and health-care clinics.<sup>82</sup> Although Indian tribes around the country had found a method to finally become self-reliant, many states sought to prevent the tribes from conducting the games.<sup>83</sup> Subsequently, in 1987 the United States Supreme Court in *California v. Cabazon Band of Mission Indians* [hereinafter "*Cabazon*"],<sup>84</sup> provided the support desperately sought by many tribes around the country.<sup>85</sup>

77. *Butterworth*, 658 F.2d at 313.

78. See *Loretta*, 234 So. 2d at 665.

79. *Butterworth*, 658 F.2d at 314 (quoting in part *Carroll v. State*, 361 So. 2d 144 (Fla. 1978)).

80. *Id.*

81. See 133 CONG. REC. S2241 (daily ed. Feb. 19, 1987). Within six years after *Butterworth*, 100 bingo operations had opened on Indian lands and were estimated to generate \$100 million in annual revenues. *Id.*

According to the National Indian Gaming Commission, at least 140 Indian gambling operations are in business in the United States. Tom Davidson & Bob French, *Support for Casino Gambling, Bingo Evident at Tribal Powwow*, SUN-SENTINEL, Jan. 10, 1992, at 1B.

82. Davidson & French, *supra* note 81, at B1.

83. In *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981), Wisconsin sought to prevent the Oneida Tribe from conducting high stakes bingo. The state was unsuccessful in enforcing the state bingo law. *Id.* Subsequently, Wisconsin sought to prevent the Lac du Flambeaus from operating their bingo hall. The court, in *Lac du Flambeau Band v. Williquette*, 629 F. Supp. 689 (W.D. Wis. 1986), held the bingo laws were civil/regulatory in nature and unenforceable under Public Law 280. *Id.* In *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), the court determined the state was without jurisdiction over the small tribe, and could not enforce the state law. *Id.*

84. 480 U.S. 202 (1987).

85. *Id.*

### C. *California v. Cabazon Band of Mission Indians*

The reinforcement of inherent tribal sovereignty was delivered by the United States Supreme Court when California, under Public Law 280, sought to prevent the Cabazon and Morongo bands of Mission Indians from conducting high-stakes bingo on their reservations.<sup>86</sup> California asserted that the tribes had violated the restrictions of the state's bingo statute<sup>87</sup> by failing to set limits on jackpots and providing payment to staff members for their services.<sup>88</sup> Although the tribes admitted their games violated the statute, they claimed the state had no authority to apply its gambling laws within the reservations.<sup>89</sup> After recognizing that "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values,"<sup>90</sup> the Court concluded that Public Law 280 "was not intended to effect total assimilation of Indian tribes into mainstream American society."<sup>91</sup> Because California did not prohibit all forms of gambling, but actually permitted a substantial amount of gambling, including pari-mutuel betting,<sup>92</sup> bingo,<sup>93</sup> and a state-operated lottery,<sup>94</sup> the state merely "regulates rather than prohibits gambling in general and bingo in particular."<sup>95</sup>

The Supreme Court, by utilizing the same regulatory analysis for Public Law 280 as was applied in *Butterworth*,<sup>96</sup> prudently favored tribal self-sufficiency and self-government over the states' need to regulate.<sup>97</sup> However, because *Cabazon* virtually depleted the power of the states to regulate under Public Law 280, and existing federal law failed to provide clear standards for tribal gaming operations, in 1988 Congress enacted the Indian Gaming Regulatory Act<sup>98</sup> to provide a remedy.

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86. *Id.*

87. CAL. PENAL CODE. § 326.5 (West Supp. 1987). The statute permits charitable organizations to conduct bingo games provided that the jackpots not exceed \$250 per game and staff members conducting the games are not paid for their services. *Id.*

88. *Cabazon*, 480 U.S. at 206.

89. *Id.*

90. *Id.* at 208.

91. *Id.*

92. CAL. BUS. & PROF. CODE § 19400-667 (West 1964 & Supp. 1987).

93. CAL. PENAL CODE. § 326.5 (West Supp. 1987).

94. CAL. CONST. art. IV, § 19(d).

95. *Cabazon*, 480 U.S. at 211.

96. 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

97. *See Cabazon*, 480 U.S. at 202.

98. 25 U.S.C. § 2701-21 (1988).



## IV. THE INDIAN GAMING REGULATORY ACT

The Indian Gaming Regulatory Act ("IGRA") was introduced to resolve the competing interests between tribes and states,<sup>99</sup> which had become the subject of considerable litigation. With the enactment of IGRA, Congress sought to facilitate tribal self-sufficiency through Indian gaming operations and to provide an adequate shield from corruption.<sup>100</sup> IGRA categorizes gambling into three classes: 1) unregulated class I gaming includes social games or ceremonial celebrations for prizes of minimal value;<sup>101</sup> 2) class II gaming includes bingo and some card games,<sup>102</sup> provided they are explicitly authorized and played in conformity with the laws and regulations of the state;<sup>103</sup> and 3) class III gaming encompasses all other forms of gambling including slot machines and banking card games.<sup>104</sup>

In order for class III gaming to be legally conducted on tribal lands, the activity must: 1) be authorized by a tribal resolution and approved by the Chairman of the National Indian Gaming Commission; 2) be located in a state that permits such gaming for any purpose by any person, organization, or entity; and 3) be conducted in conformity with a Tribal-State compact

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99. 133 CONG. REC. E387 (daily ed. Feb. 5, 1987). State officials expressed a need to regulate Indian gaming because the activity attracted organized crime. *Id.* Meanwhile, the tribes wish to raise revenue, and have resisted these assertions of state jurisdiction. *Id.*

100. See 25 U.S.C. § 2702 (1988). The purpose of IGRA is:

1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; 2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and 3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

*Id.*

101. 25 U.S.C. § 2703(6) (1988).

102. *Id.* § 2703(7)(A). "Class II gaming" includes those nonbanking card games where players play against each other rather than the house, e.g. poker; "Class II gaming" does not include banking card games, including baccarat, chemin de fer, or blackjack. 25 U.S.C. § 2703 (7)(B)(i) (1988).

103. *Id.* § 2703(7)(A).

104. *Id.* § 2703(8).

entered into by the Indian tribe and the state.<sup>105</sup> Any Indian tribe having jurisdiction over Indian lands that wishes to conduct class III gaming must request that the state in which the lands are located enter into negotiations for the purpose of entering into a Tribal-State compact.<sup>106</sup> Upon receiving notice, the state is obliged to negotiate with the Indian tribe in good faith to enter into the compact.<sup>107</sup>

Furthermore, IGRA provides for federal jurisdiction of any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations, or failure to negotiate in good faith with the tribe.<sup>108</sup> In the event the court determines that the state failed to negotiate in good faith with the tribe, the court may order the parties to conclude a compact within a sixty-day period.<sup>109</sup> Furthermore, if the parties fail to reach an agreement, a court appointed mediator may select the proposed compact that best comports with IGRA.<sup>110</sup> Although IGRA was envisioned to be a solution to the myriad of litigation between tribes and states, the provision allowing class III gaming under a Tribal-State compact has prompted the Seminoles, as well as other tribes, to file suits against their respective states.

## V. SEMINOLE TRIBE V. FLORIDA

In Florida, the Seminoles have once again found themselves in opposition with the state concerning reservation gambling.<sup>111</sup> The Semi-

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105. *Id.* § 2710(d)(1).

106. *Id.* § 2710(d)(3)(A).

107. 25 U.S.C. § 2710(d)(3)(A) (1988).

108. *Id.* § 2710(d)(7)(A).

109. *Id.* § 2710(d)(7)(B)(iv).

110. *Id.*

111. *Seminole Tribe of Fla. v. Florida*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993). On January 29, 1991, Chairman James E. Billie wrote to Governor Lawton Chiles requesting negotiation, pursuant to IGRA, for a Tribal-State compact permitting the Seminoles to conduct certain "class III gaming" on their reservations. *Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum* at 8, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993). The Seminoles wished to conduct poker, video games that duplicated poker, bingo, pull tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. *Id.* On May 24, 1991, the State asserted that poker would be the only activity negotiated for the Tribal-State compact. *Id.* Subsequently, Tribal Chairman James Billie submitted additional requests to negotiate casino gambling, but was again refused by the State. *Id.* On August 22, 1991, the State asserted that it would only negotiate those activities expressly authorized by state statute, namely poker, raffles, and pari-mutuel wagering on dogs, horse racing, and jai alai. *Id.*

noles have recently brought suit against the State of Florida claiming that it failed to negotiate in good faith a Tribal-State compact.<sup>112</sup> As a defense, Florida claimed immunity under the Eleventh Amendment,<sup>113</sup> but the United States District Court, despite case authority to the contrary,<sup>114</sup> held state immunity under the Eleventh Amendment was abrogated by Congress under the Indian Commerce Clause.<sup>115</sup> Basically, Congress had the power to permit tribes to sue states under IGRA notwithstanding the Eleventh Amendment, which prevents states from being sued in federal court.<sup>116</sup>

### A. *The Seminole's Arguments*

#### 1. A Regulatory Policy Towards Class III Gaming Compels Negotiation

The Seminoles, who conduct gaming on tribal lands in Tampa and Hollywood, maintain that negotiations for gambling machines (slot machines) and casino-gambling are mandatory to conclude a Tribal-State

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112. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

113. *See Seminole Tribe of Fla. v. Florida*, 801 F. Supp. 655 (S.D. Fla. 1992). The Eleventh Amendment to the U.S. Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commence or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

114. *See Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992) [hereinafter "*Sault Ste. Marie*"]; *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991). These courts reasoned that "mutuality of concession" grants Congress the power to abrogate state immunity. *Sault Ste. Marie*, 800 F. Supp. at 1488; *Spokane Tribe of Indians*, 790 F. Supp. at 1061. Since states have mutually surrendered immunity under the Interstate Commerce Clause, Congress has the power to abrogate. *Id.* Since Indians Tribes have retained their immunity from suits by the states, no mutuality of concession exists. *Id.* Therefore, Congress did not have the authority to abrogate state immunity under the Indian Commerce Clause. *Id.*

115. *Seminole Tribe of Fla.*, 801 F. Supp. at 657. The court determined the existence of three exceptions to state immunity under the Eleventh Amendment: 1) a state may consent to suit in federal court, or waive its immunity; 2) Congress may abrogate state immunity when possessing the power; and 3) state officials, in their official capacities, may be sued to obtain prospective relief. *Id.*

116. *Id.* The *Seminole* court reasoned that both the Indian and Interstate Commerce Clauses are found in the same delegation of legislative authority. *Id.* Therefore, under the Indian Commerce Clause, Congress had the power to abrogate state immunity. *Seminole Tribe of Fla.*, 801 F. Supp. at 657.

compact, if any Class III gaming is permitted in Florida.<sup>117</sup> Because Florida expressly permits pari-mutuel wagering<sup>118</sup> and a state-operated lottery,<sup>119</sup> both class III gaming activities, the Seminoles assert that all class III gaming is negotiable for a Tribal-State compact.<sup>120</sup> Relying upon the *Cabazon* analysis, and the holdings in *Mashantucket Pequot Tribe v. Connecticut*<sup>121</sup> and *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*,<sup>122</sup> the Seminole tribe argues that, basically, all class III games can be negotiated in the compact process unless Florida, as a matter of criminal law and public policy, prohibits class III gaming activities.<sup>123</sup>

#### a. *Mashantucket Pequot Tribe*

*Mashantucket Pequot Tribe v. Connecticut*<sup>124</sup> was the first case to apply the *Cabazon* analysis of Public Law 280 to class III gaming activities under IGRA. The Mashantucket Pequot Tribe sought to operate casino-type games of chance on its reservation, and requested that the State of Connecticut enter into negotiations to form a Tribal-State compact in accordance with IGRA.<sup>125</sup> The tribe asserted that since the state permitted "Las Vegas Nights" under its constitution,<sup>126</sup> class III gaming could properly be the subject for negotiation of a Tribal-State compact.<sup>127</sup> According to the

117. *Id.* The tribe maintains "permits such gaming" means if any class III gaming is located within the state then all "class III gaming is up for negotiation." Seminole Tribe's Reply Memorandum in Support of Its Motion for Summary Judgment at 2, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

118. See FLA. CONST. art. X, § 7.

119. See *id.* art. X, § 15.

120. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 3, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

121. 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1620 (1991).

122. 770 F. Supp. 480 (W.D. Wis. 1991).

123. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 18, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

124. 913 F.2d at 1024.

125. *Id.* at 1025.

126. See CONN. GEN. STAT. § 7-186a-p (1989). The statute permits "Las Vegas Nights" to be conducted by any nonprofit organization, association, or corporation. Such entities may promote and operate games of chance to raise funds for the purposes of such organization, association, or corporation, subject to specified conditions and limitations. *Id.*; see also *Mashantucket Pequot Tribe*, 913 F.2d at 1029.

127. *Mashantucket Pequot Tribe*, 913 F.2d at 1027.

state, the limited authorization of "Las Vegas Nights" conducted by nonprofit organizations did not satisfy the condition under IGRA that the activity had been "permitted" by the state;<sup>128</sup> therefore, because casino gambling was actually against the public policy of Connecticut, there was no obligation to negotiate a Tribal-State compact.<sup>129</sup>

In determining whether casino-type gaming should be the subject of negotiation, the court examined both congressional findings and legislative history.<sup>130</sup> According to the congressional finding in 25 U.S.C. section 2701(5) of IGRA, "[i]ndian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."<sup>131</sup> Not only did the court determine the congressional finding was consistent with the Supreme Court's rationale in *Cabazon*, but according to legislative history,<sup>132</sup> the requirement that class II gaming be "located within a State that permits such gaming for any purpose by any person, organization or entity"<sup>133</sup> was likewise specifically adoptive of the *Cabazon* rationale.<sup>134</sup> The *Mashantucket* court applied the legislative intent behind class II gaming requirements, and assimilated its basis to class III gaming due to the fact that both provisions contain identical language.<sup>135</sup> Under this statutory construction, the court concluded that class

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128. *Id.* According to IGRA, class III gaming activities shall be lawful on Indian lands only if such activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity" 25 U.S.C. § 2710(d)(1)(B) (1988).

129. *Mashantucket Pequot Tribe*, 913 F.2d at 1029.

130. *Id.*

131. *Id.*

132. S. REP. No. 446, 100th Cong., 2nd Sess. 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076.

133. 25 U.S.C. § 2710(b)(1)(A) (1988).

134. *Mashantucket Pequot Tribe*, 913 F.2d at 1029. The court referred to *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990), for an interpretation of the legislative history as to section 2710(b)(1)(A) and class II gaming. *Mashantucket Pequot Tribe*, 913 F.2d at 1029. The court in *Sisseton* revealed that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365.

135. *Mashantucket Pequot Tribe*, 913 F.2d at 1030. Both sections require that "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity" 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B) (1988).

Under a settled principle of statutory construction, "when the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one

III gaming should be negotiated in the compact process unless the state, "as a matter of criminal law and public policy, prohibit[s] [class III] gaming activity."<sup>136</sup> The *Mashantucket* court held the state's approach to class III gaming was regulatory rather than prohibitory because Connecticut not only permitted "Las Vegas nights," but also a state-operated lottery, bingo, jai-alai, and other forms of pari-mutuel betting.<sup>137</sup> Therefore, "such gaming is not totally repugnant to the state's public policy," and should be the subject of negotiations for a Tribal-State compact.<sup>138</sup> As a result of this ruling, the state was forced to negotiate casino gambling, and the Mashantucket Pequots now run one of the largest tribal casinos in the country with an estimated revenue intake of \$100 million a year.<sup>139</sup>

### b. *Lac du Flambeau Tribe*

A case frequently cited by the Seminole Tribe of Florida is *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*.<sup>140</sup> The Flambeau Tribe filed suit against the state of Wisconsin under IGRA alleging that it failed to negotiate in good faith for a Tribal-State compact.<sup>141</sup> The tribe sought to conduct casino games, including video gaming machines, roulette, slot machines, poker, and craps on their reservation.<sup>142</sup> Pursuant to the requirements of IGRA, the tribe submitted a written request for Tribal-State compact negotiations.<sup>143</sup> With the exception of lotteries and on-track pari-mutuel wagering, the state refused to negotiate class III gaming with the tribe because those activities were prohibited in Wisconsin.<sup>144</sup> Once again, the issue centered around the meaning of section 2710(d)(1)(B) which requires that class III gaming activities are "located in a State that *permits* such gaming for any purpose

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place, it will be construed to have the same meaning in the next place." *Mashantucket Pequot Tribe*, 913 F.2d at 1030 (quoting *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978), *cert. denied*, 436 U.S. 930 (1978)).

136. *Mashantucket Pequot Tribe*, 913 F.2d at 1030 (alteration in original).

137. *Id.* at 1031-32.

138. *Id.*

139. Eric J. Swanson, *The Reservation Gaming Craze: Casino Gambling Under the Indian Gaming and Regulatory Act of 1988*, 15 HAMLINE L. REV. 471, 480 (1992).

140. 770 F. Supp 480 (W.D. Wis. 1991).

141. *Id.* at 483.

142. *Id.*

143. *Id.*

144. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 770 F. Supp. at 484 [hereinafter "Flambeau"].

by any person, organization or entity . . . .”<sup>145</sup> According to the state, because casino gambling, video games, and slot machines were not permitted for any purpose by any person, organization, or entity within Wisconsin, it was not required to negotiate their use.<sup>146</sup> The state maintained it need only negotiate those particular activities that were operating legally within the state.<sup>147</sup>

The court, in accord with *Mashantucket Pequot Tribe*,<sup>148</sup> resolved the issue using the *Cabazon* analysis.<sup>149</sup> The court concluded “[t]he initial question in determining whether Wisconsin ‘permits’ the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin’s public policy toward class III gaming is prohibitory or regulatory.”<sup>150</sup> If the policy is to prohibit all forms of class III gaming by anyone, then the policy is characterized as criminal/prohibitory, and the activities are not subject to negotiation.<sup>151</sup> If the state allows some forms of class III gaming, even subject to extensive regulation, then its policy is considered civil/regulatory and such activities necessitate negotiation.<sup>152</sup>

In determining Wisconsin’s public policy, the court found that for more than a century, Wisconsin’s Constitution had banned lotteries.<sup>153</sup> The prohibition was defined as the operation or playing of any game, scheme or plan involving the element of prize, chance and consideration.<sup>154</sup> In 1987, voters amended the Wisconsin Constitution to allow for a state-operated lottery and pari-mutuel on-track betting.<sup>155</sup> According to the court, the authorization of a state-operated lottery “removed any remaining constitutional prohibition against state-operated games, schemes or plans involving prize, chance and consideration . . . .”<sup>156</sup> As a result, Wisconsin’s public

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145. 25 U.S.C. § 2710(d)(1)(b) (1988) (emphasis added).

146. *Flambeau*, 770 F. Supp. at 484.

147. *Id.* at 485.

148. *Mashantucket Pequot Tribe*, 913 F.2d at 1024. The *Flambeau* court and the *Mashantucket* court utilized identical analysis of legislative history and congressional findings in order to determine that the *Cabazon* analysis should interpret 25 U.S.C. § 2710(d)(1)(B) of the IGRA. See *id.*; *Flambeau*, 770 F. Supp. at 485.

149. See *Flambeau*, 770 F. Supp. at 485.

150. *Id.* at 486.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Flambeau*, 770 F. Supp. at 486.

155. *Id.*

156. *Id.*

policy toward class III gaming was deemed regulatory in nature, and the state was required to negotiate the requested activities.<sup>157</sup>

## 2. Florida Permits Class III Games Sought for Negotiation

To further support the right to negotiate casino gambling, the Seminoles alternatively argue that the activities they wish to conduct are permitted by the State for three reasons. First, the Florida Lottery as well as many Florida pari-mutuel facilities are permitted to utilize machinery which is considered "illegal" under Florida statutes.<sup>158</sup> According to the Seminoles, the prohibition of certain gambling devices defined under Florida Statutes section 849.16 are actually permitted by the state<sup>159</sup> and are the proper subject for negotiations on a Tribal-State compact.<sup>160</sup> Second, the

157. *Id.*

158. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 7, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993). The Florida Lottery operates electronic machines for certain "on-line" lottery games such as Cash 3, Play 4, Fantasy 5, and Lotto. *Id.* The terminals print out lottery tickets showing numbers chosen by the consumer or randomly chosen by the computer. *Id.* If the ticket reveals the winning numbers selected in Tallahassee, the holder is entitled to receive money in exchange for the ticket. *Id.*

Furthermore, fifteen pari-mutuel facilities utilize automated machines (SAMS) which enable a bettor to select his or her desired number or combination by inserting money, vouchers, or credit cards into the machine. *Id.*

The machines utilized by the Florida Lottery and the various pari-mutuel facilities fashion those prohibited under Florida Statutes section 849.16 (1991). Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 7, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

159. *Id.* Section 849.16 of Florida Statutes defines the machines and devices which come within the provision of the law as:

1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him, may:

a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade . . . .

FLA. STAT. § 849.16 (1991).

160. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 8, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept.



state expressly permits casino gambling when one-day gambling cruise ships are authorized to use Florida ports for the expressed purpose of offering casino-style entertainment on the high seas.<sup>161</sup> Finally, various charities in Florida have conducted "Casino Nights," which include raising money through the use of blackjack tables, roulette wheels, crap tables, and other casino equipment. However, the state has repeatedly failed to enforce the prohibition against casino gambling.<sup>162</sup> The Seminoles urge that the authorization of these activities indicate that Florida "permits such gaming" under IGRA and, therefore, gaming machines and casino gambling should be negotiable for a Tribal-State compact.<sup>163</sup>

## B. The State's Counter-Arguments

### 1. The State is Not Obligated to Negotiate Any Class III Game Not Expressly Permitted

In sharp contrast, the state urges that the Supreme Court analysis in *California v. Cabazon Band of Mission Indians*,<sup>164</sup> which was relied upon by the legislature with respect to class II gambling, cannot be applied to class III gaming due to the substantial difference between the two classes of activities.<sup>165</sup> Primarily, the state's reasoning hinges on the fact that class II

22, 1993).

161. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 8, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993). Section 849.231(3) of the Florida Statutes provides for an exception to the prohibition against the possession of gambling devices. See FLA. STAT. § 849.231(3) (1991). "This section . . . [does] not apply to a vessel of foreign registry or a vessel operated under the authority of a country except the United States, while docked in this state or transiting in the territorial waters of this state." *Id.*

Presently, three of the more than 47 cruise ships, which sail from Florida ports offering casino gambling, are day cruises. Bob LaMendola, *All Aboard for Big Bucks Cruise Ships Reel in Money With Casino Games*, SUN-SENTINEL, May 17, 1992, at A1. The day cruises haul approximately 920,000 passengers each year, accounting for about one-third of South Florida's cruise trade. *Id.* The day cruises travel out three miles beyond Florida waters, and sail around for a few hours in order to provide casino gambling. *Id.* The cruise ships do not contribute any gambling revenue to the state. *Id.*

162. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 6, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

163. *Id.* at 4.

164. 480 U.S. 202 (1986).

165. Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 1, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D.

gaming involves mainly "social" gambling, while class III gambling is "hard core."<sup>166</sup> The state simply asserts that the *Mashantucket* and *Pequot* courts have erred in their legislative analysis of class III gaming, and alternatively argues that legislative history indicates that states, during the compact process, are to provide their expertise in gaming in order to instruct the tribes as to appropriate regulation.<sup>167</sup> Therefore, it is argued that states are not required to negotiate class III games which they do not permit because states could not possibly render instruction on gaming they have not experienced.<sup>168</sup>

## 2. The Activities Permitted in Florida Do Not Necessitate Negotiation

Although the state has proceeded to negotiate certain class III gaming like horse racing, dog racing, and jai-alai, it has refused to negotiate on gaming machines or casino gambling.<sup>169</sup> The state maintains that negotiations hinge on activities which are "legal" within the state, and since slot machines and casino gambling are illegal in Florida,<sup>170</sup> the state need not negotiate for their use.<sup>171</sup> First, the state maintains that the machines utilized by the Florida Lottery and various pari-mutuel facilities do not fit within the context of the Florida Statute,<sup>172</sup> and are not gambling machines as the tribe asserts.<sup>173</sup> According to the state, "[t]he statute requires that the machine make the player entitled to receive some prize by reason of any element of chance or of any other outcome of such operation unpredictable

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Fla. Sept. 22, 1993).

166. *Id.*

167. Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment at 3, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

168. *Id.*

169. *Id.* at 2.

170. Pursuant to section 849.16 of the Florida Statutes, illegal gambling devices include those which operate by insertion of money or an object, and by reason of chance, the player may become entitled to receive money, or a ticket which may be exchanged for money. FLA. STAT. § 849.16 (1991).

171. Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment at 3, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

172. FLA. STAT. § 849.16 (1991).

173. Defendants' Memorandum in Response to Plaintiff's Motion for Summary Judgment at 12, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

by him.”<sup>174</sup> Therefore, because the machines utilized by the Florida Lottery and pari-mutuel facilities do not operate to determine the prize, e.g. the horse race, or the lottery numbers chosen in Tallahassee, the state does not “permit” gambling machines as attested to by the Seminoles.<sup>175</sup> Furthermore, the state asserts that casino gambling conducted by foreign flag vessels who use Florida ports is only permitted in international waters, and is a limited exception to the statute,<sup>176</sup> which criminally prohibits the general possession of gambling paraphernalia.<sup>177</sup> Finally, the state refutes the Tribe’s argument concerning charity “Casino Nights” by indicating that Florida “does not ‘permit’ casino gambling merely because a charitable activity in violation of the state’s statutory prohibition<sup>178</sup> is not high on local law enforcement priorities.”<sup>179</sup>

## VI. SEMINOLE TRIBE V. FLORIDA: THE DISTRICT COURT DECISION

Recently, the United States District Court for the Southern District of Florida has ruled against the Seminoles, concluding that the state did not negotiate in bad faith under IGRA when the state refused to negotiate casino gambling in the compact process.<sup>180</sup> The court agreed with the tribe “that the legislative history relating to the phrase as found in the provision governing Class II gaming is instructive regarding the meaning of the language found in the provision governing Class III gaming.”<sup>181</sup> As a result, the court concluded that “Congress intended the

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174. Defendants’ Memorandum in Response to Plaintiff’s Motion for Summary Judgment at 12, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

175. *Id.*

176. FLA. STAT. § 849.231 (1991).

177. Defendants’ Memorandum in Response to Plaintiff’s Motion for Summary Judgment at 10, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

178. See FLA. STAT. § 849.231 (1991) (prohibiting possession of gambling paraphernalia); *id.* § 849.08 (prohibiting gambling in general); *id.* § 849.01 (prohibiting the keeping of a gambling house).

179. Defendants’ Memorandum in Response to Plaintiff’s Motion for Summary Judgment at 11, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

180. See *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*17.

181. *Id.* at \*12.

prohibitory/regulatory analysis found in *Cabazon* to be consistent with and to be applied to the IGRA provisions covering both Class II and Class III gaming.”<sup>182</sup>

The district court, however, refused to accept the tribe’s argument that the permittance of any class III gaming activity within the state opens negotiations for all class III activities; in doing so, the court narrowly interpreted the cases upon which the tribe relied in support of its position.<sup>183</sup>

The court restrictively interpreted *Mashantucket* to stand for the proposition that in order to compel negotiation of a class III gaming activity, that particular activity must be permitted by statute and, therefore, merely regulatory in nature.<sup>184</sup> This analysis is not only restrictive of the essential wording in *Mashantucket*,<sup>185</sup> but is likewise restrictive of the *Cabazon* analysis.<sup>186</sup> When determining a state’s public policy in the context of a particular class III activity requested, the court is to look at whether class III gaming in general is “totally repugnant to the State’s public policy.”<sup>187</sup> If the state permits other forms of gambling similiar in scope, i.e. a state-operated lottery and pari-mutuel racing, the existence of those games reflect upon that state’s tolerance for that class of gaming.<sup>188</sup> Therefore, if a state’s public policy towards a class of activities is regulatory in nature, then all class III activities are subject to negotiation provided they are requested for by the tribe.<sup>189</sup>

182. *Id.*

183. *See id.* at \*13.

184. *See id.* at \*14-15.

185. The *Mashantucket* court, in accordance with the wording in *Cabazon*, revealed that Connecticut permitted “other forms of gambling, such as a state-operated lottery, bingo, jai alai and other forms of pari-mutuel betting” which factored into the realization that Connecticut’s public policy towards class III gaming in general was regulatory. *Mashantucket Pequot Tribe*, 913 F.2d at 1031. Furthermore, the fact that charities were allowed to conduct Las Vegas Nights was an additional factor in the court’s conclusion “that the Connecticut law applicable to class III gaming is regulatory rather than prohibitive.” *Id.* at 1032.

186. In *Cabazon*, the Supreme Court expressly relied upon the existence of other forms of gambling to determine California’s public policy towards the disputed activity. *Cabazon*, 480 U.S. at 210-11. “In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in *general* and bingo in *particular*.” *Id.* at 211 (emphasis added).

187. *See Mashantucket Pequot Tribe*, 913 F.2d at 1031.

188. *See id.*

189. *See id.* at 1030. The court stated, “The compact process is therefore to be invoked unless, applying the *Cabazon* test, it is determined that the state, ‘as a matter of criminal law

The district court, interpreting *Mashantucket*, quoted the case, which stated "This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation."<sup>190</sup> This statement, in its proper context, does not indicate how the court arrived at its holding, but indicates the state need only negotiate the particular class III activity requested.<sup>191</sup> An analysis of the *Mashantucket* holding reveals that, in general, if the state's treatment of "class III gaming is regulatory rather than prohibitive," this fact determines whether the state must negotiate the class III activity requested.<sup>192</sup>

In deciding whether *Flambeau* was applicable, the district court dismissed that court's analysis because it had based its decision on an erroneous interpretation of *Cabazon*.<sup>193</sup> Once again, the district court's restrictive interpretation of *Cabazon*, as well *Mashantucket*, led to the conclusion that the *Flambeau* holding was erroneous.<sup>194</sup> *Flambeau* stood for the proposition that to determine whether a state must negotiate a particular class III gaming activity, the "issue is not whether the state has given express approval to the playing of a particular game," but whether the state's "public policy toward class III gaming is prohibitory or regulatory."<sup>195</sup> This proposition is directly in line with the essential analysis in both *Cabazon* and *Mashantucket*.<sup>196</sup>

Furthermore, even if the *Flambeau* decision was not erroneously based, the district court determined that review of Wisconsin's public policy towards the disputed gaming activity is necessary under the *Cabazon* analysis, and that reliance solely on a state's constitution is not indicative of its public policy towards gambling.<sup>197</sup> Although this fact may be true, the Seminole Tribe did not rely solely on the similarities between the states' constitutions in attempting to show an analogous public policy but in fact,

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and public policy, prohibit[s] [class III] gaming activity.'" *Id.* See also *Flambeau*, 770 F. Supp. at 487. The *Flambeau* court stated, "the initial question in determining whether Wisconsin 'permits' the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy toward class III gaming is prohibitory or regulatory." *Id.* at 486.

190. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*8 (quoting *Mashantucket Pequot Tribe*, 913 F.2d at 1031-32).

191. See *Mashantucket Pequot Tribe*, 913 F.2d at 1032.

192. See *id.*

193. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*8.

194. *Id.*

195. *Flambeau*, 770 F. Supp. at 486.

196. See *supra* text accompanying notes 185-86.

197. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*18 n.1.

the Seminoles asserted the similarities of both states' statutes, which still prohibit various forms of casino gambling.<sup>198</sup> Therefore, the district court, in its determination to find that *Flambeau* does not control this case, attacked the court's interpretation of *Cabazon* and ignored the similarities between both states' statutory schemes with regard to the particular disputed activity, casino gambling.<sup>199</sup>

The *Flambeau* court, in determining Wisconsin's public policy, examined the gradual diminution of that state's constitutional ban against lotteries, and determined Wisconsin no longer prohibits gaming but rather regulates it.<sup>200</sup> Likewise, Florida has diminished its constitutional stronghold on banning lotteries, which may indicate an analogous public policy towards class III gaming.<sup>201</sup> Historically, both Florida and Wisconsin had constitutional provisions banning all lotteries,<sup>202</sup> but eventually provided for constitutional amendments and statutory provisions designed to permit charitable bingo,<sup>203</sup> pari-mutuel wagering,<sup>204</sup> and state-operated lotteries.<sup>205</sup> Although each state continues to criminally prohibit gambling

198. See Seminole Tribe's Reply Memorandum in Support of Its Motion for Summary Judgment at 7, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993). In the state of Florida, statutes provide criminal punishment for the operation of a gambling machine or device. See FLA. STAT. § 849.15(1) (1991). In addition, the placing of a bet or wagering of any money or thing of value is punishable. See *id.* § 849.14 (1991). The state of Wisconsin likewise provides criminal punishment for the making of a bet or operating a gambling machine. See WIS. STAT. § 945.02 (1982).

199. See *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*18 n.1.

200. *Flambeau*, 770 F. Supp. at 486.

201. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 19, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

202. Both states included constitutional provisions which prohibited lotteries. See WIS. CONST. art. IV, § 24 (1848); FLA. CONST. art. III, § 23 (1885).

203. In 1968, Florida adopted section 849.093, which permitted certain charitable, nonprofit organizations to conduct bingo games. See FLA. STAT. § 849.093 (1969) (repealed 1992). Furthermore, bingo was interpreted to be included as a parimutuel game under article X, section 7 of the Florida Constitution. See *Loretta*, 234 So. 2d at 671.

In 1973, the Wisconsin Constitution was likewise amended to permit charitable organizations to conduct bingo. See WIS. CONST. art. IV, § 24(3).

204. In 1968, the Florida Constitution was amended to permit pari-mutuel pools to legally function within the state. See FLA. CONST. art. X, § 7. The constitutional amendment permitted dog racing, horse racing, and jai alai. *Id.*

In 1987, the Wisconsin Constitution provided for the legalization of pari-mutuel, and on-track wagering. See WIS. CONST. art. IV, § 24(5).

205. In 1987, both Wisconsin and Florida established state-operated lotteries by constitutional amendment. See FLA. CONST. art. X, § 15; WIS. CONST. art. IV, § 24(6).

activities,<sup>206</sup> this fact alone does not render a state's public policy as prohibitory.<sup>207</sup> According to the Supreme Court in *Cabazon*, the fact that a state provides criminal punishment for certain gambling activities does not necessarily make a prohibitory policy.<sup>208</sup> Therefore, this gradual acquiescence by both states to legalize gambling indicates a similar regulatory scheme, and the holding in *Flambeau* should have controlled the outcome in *Seminole*.<sup>209</sup>

On the issue of whether the state in fact permits precisely those class III activities the Tribe seeks to negotiate, the district court refused to accept any argument. First, Judge Marcus admitted that "certain Florida charities have conducted casino or Las Vegas nights," but did not believe that the existence of thirty-three events evinces a public policy permitting casino gambling.<sup>210</sup> Once again, the court was unwilling to look towards the state's policy in general as to class III activities.<sup>211</sup> Undoubtedly, utilizing the *Mashantucket* and *Flambeau* analysis, the recorded existence of casino gambling permitted by charities, as well as the existence of other class III gaming, evinces a regulatory public policy permitting class III gaming in general.<sup>212</sup> Although the Tribe argued the similarity between the permitting of Las Vegas nights in Florida with those permitted in *Mashantucket*, the district court, consistent with its policy of restrictive interpretation, was quick to point out that Connecticut "officially sanctioned the operation of casino nights by way of statute."<sup>213</sup>

Next, the *Seminole* court was unimpressed with the tribe's assertion that one-day gambling ships, which embark passengers from Florida ports with no destination other than the high seas, evinces a regulatory public policy toward casino gambling.<sup>214</sup> The district court relied upon the fact that no gambling occurs within the territorial bounds of the State, but failed to refute the argument that when given the ability to prohibit these specific gambling cruises to nowhere, the state continues to permit the activity to

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206. See *supra* text accompanying note 198.

207. See *Cabazon*, 480 U.S. at 211.

208. *Id.*

209. Seminole Tribe of Florida's Motion for Summary Judgment and Supporting Memorandum at 19, *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, (S.D. Fla. Sept. 22, 1993).

210. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*13.

211. See *id.*

212. See *Mashantucket Pequot Tribe*, 913 F.2d at 1031-32; *Flambeau*, 770 F. Supp. at 486.

213. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*12.

214. *Id.* at \*36.

occur.<sup>215</sup>

Finally, Judge Marcus, relying upon *Deeb v. Stoutamire*,<sup>216</sup> determined that the machines utilized by the Florida Lottery and various pari-mutuel facilities ("SAMS")<sup>217</sup> are not violative of Florida Statutes section 849.16.<sup>218</sup> The court reasoned:

[T]he unpredictable event or element of chance which determines the winner must be linked to the machine's operation. Thus, the winner at a parimutuel facility is determined by the dog or horse race, not by the operation of the SAMS machines. Similarly, the winner of the State Lottery is determined by the weekly drawing in Tallahassee, not by the operation of the individual lottery ticket terminals.<sup>219</sup>

In review of the various issues raised by the tribe, as well as the pattern by which the district court restrictively interpreted the word "permits" under the IGRA, it is apparent that the court has not only misconstrued case law supporting the tribe, but has ignored the basic legislative intent for enacting IGRA. Congress intended to preserve tribal sovereignty while promoting economic development and self-sufficiency.<sup>220</sup>

According to legislative history, the compact process was envisioned to provide a mechanism for "two sovereigns—the tribes and the States—[to] sit down together in negotiations on equal terms and come up with a recommended methodology for regulating class III gaming on Indian lands."<sup>221</sup> Legislative history provides no indication that compact negotiations would depend upon what the State thought were appropriate activities for the tribe to engage in, but rather Congress was explicit in reinforcing tribal sovereignty.<sup>222</sup> The district court was obligated to adhere to Congress' intent for enacting IGRA, and should, therefore, have liberally construed the word "permits" in favor of the tribe and not the state. In this case, because the sovereign state reaps the benefits from permitting a variety of class III

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215. *Id.* at \*38.

216. 53 So. 2d 873 (Fla. 1951).

217. *See supra* text accompanying note 158.

218. *See supra* note 170.

219. *Seminole Tribe of Fla.*, No. 91-6756, 1993 WL 475999, at \*16.

220. *See* 25 U.S.C. § 2702(1) (1988).

221. *See* 134 CONG. REC. S12651 (daily ed. Sept. 15, 1988).

222. *Id.* According to legislative history, the IGRA was not intended to be a "blanket transfer to any State of any jurisdiction over Indian lands. Indian tribes are sovereign governments and exercise rights of self-government over their lands and members. This bill does not seek to invade or diminish that sovereignty." *Id.* at S12650.



gaming activities, which include five forms of pari-mutuel wagering,<sup>223</sup> and four on-line computer games of the state-operated lottery,<sup>224</sup> it is only equitable that the other sovereign entity, the Seminole Tribe, who supposedly is negotiating on "equal terms," have the facts liberally construed in its favor.

## VII. THE FUTURE OF FLORIDA GAMBLING

The Seminoles will undoubtedly seek to negotiate for new machines that conform to those utilized by the Florida Lottery and various pari-mutuel facilities. The thrust of the argument will surely entail the length of the period of time whereby the unpredictable event, which is determined by an independent machine, must take place. The existence of these machines may prove to be just as successful in luring the public as those machines rejected by the *Seminole* court.

Additionally, the State of Florida has decided to negotiate an agreement with the Seminoles that would allow the tribe to offer poker, pinochle, bridge, and other card games without a pot limit.<sup>225</sup> Players will legally be able to wager thousands of dollars at these games,<sup>226</sup> and the state will not receive any revenue from it.<sup>227</sup> This legalization of tribal card games may be the beginning of what lies ahead for Florida's gambling future.

Even if the Seminoles lose on appeal, the tribe will continue to offer machines conforming to the district court ruling and provide those card games presently under negotiation. Consequently, many Florida gamblers, as well as curious spectators, will flock to the reservations, and will spend millions of dollars that will elude taxation by the state. As a result, Florida's inability to tax the tribe creates a loss of potential revenue desperately needed for crime prevention, public schools, and its rebuilding program after Hurricane Andrew. As a solution, Florida should legalize

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223. As of 1992, the state of Florida regulated 5 thoroughbred tracks, 1 quarter horse track, 19 greyhound tracks, 10 jai alai frontons, and 1 harness racing track. 1992 FLA. DEP'T OF BUS. REG., DIV. OF PARI-MUTUEL WAGERING ANN. REP. 23-32. The state received 6.06% of the total pari-mutuel handle from 5321 racing days which generated \$105,074,018 in state revenue. *Id.* at 21.

224. In 1992, the Florida Lottery generated \$2.17 billion in state revenue. *Lottery's Earning Power Slips After 5 Years*, SUN-SENTINEL, July 18, 1993, at A13.

225. Bob French, *Seminoles Seek High-Stakes Gambling*, SUN-SENTINEL, Aug. 7, 1993, at B1.

226. *Id.*

227. See Clark, *supra* note 46.

casino gambling within the state and expand its economic base by taxing the revenue acquired by regulated casino gaming facilities.

Although Floridians have the power to change Florida's constitutional prohibition against casino gambling,<sup>228</sup> they have been reluctant to do so for fear that legalization of casinos will bring organized crime and corruption to the state. These fears are based erroneously on comparisons with Las Vegas and Atlantic City, neither of which were as big or as developed as South Florida when their casinos were legalized.<sup>229</sup>

According to one authority, "Nevada has had the biggest problems controlling organized crime in casinos for one simple reason: organized crime built the industry. Inspired by the success of gangster Meyer Lansky's casinos in Havana, Bugsy Siegel moved to Las Vegas and founded a gambling empire."<sup>230</sup> Nevada was a desert with no future, and officials gladly received casino revenues no matter who was paying.<sup>231</sup> Presently, Nevada has partially succeeded in eliminating organized crime and corruption; however, the state still employs fewer than two regulatory workers per licensed casino, thus enabling corruption to linger.<sup>232</sup>

By contrast, New Jersey employs nearly 100 regulators per casino, with an annual budget of \$50 million a year paid up-front by the casinos.<sup>233</sup> In 1976, Atlantic City legalized casino gambling as a solution to its bleak economy: tourism was failing, seaside hotels were deteriorating, the local businesses were boarding up, and the unemployment rate was high and climbing.<sup>234</sup> Casino gambling proved to be the solution. Shortly thereafter, Atlantic City became the most popular destination in America, drawing one-third more people than Disney World, despite having nothing more to offer than gambling.<sup>235</sup> Casinos have not only provided Atlantic City with the means for economic development,<sup>236</sup> but have also provided the revenue

228. See *supra* text accompanying note 37.

229. Dave Von Drehle, *Facts, Guesses About Casinos Consider Source Each Side Has Its Own Vision of Future with Legal Gaming*, MIAMI HERALD, Oct. 27, 1986, at A1.

230. Dave Von Drehle, *Casinos and Crime: Can the House Rules Keep Out the Thugs?*, MIAMI HERALD, Nov. 1, 1986, at A1. The authority was a law professor at the University of California Berkeley, Jerome Skolnick. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Dave Von Drehle, *Florida Casino Debate Goes to Boardwalk*, MIAMI HERALD, Oct. 15, 1986, at A7.

235. *Id.*

236. *Id.* In Atlantic City, casino hotels pay about two-thirds of all property taxes, in addition to an eight percent tax on gross winnings to the state, plus sales taxes, licensing

revenue to enforce strict regulations in order to keep organized crime out of the business.<sup>237</sup> Unfortunately, organized crime became involved in casino operations when New Jersey made a tragic mistake with the first licensed casino.<sup>238</sup> When gambling was approved in 1976, politicians promised casinos in two years. Subsequently, political pressure induced the licensing of Resorts International, despite investigative reports which provided evidence showing the applicant's close ties to organized crime.<sup>239</sup> Presently, the State of New Jersey requires every casino employee to be licensed,<sup>240</sup> and according to New Jersey officials, this has been successful in keeping organized crime and corruption out of the day-to-day operations of casinos.<sup>241</sup>

Florida retains a remarkable feature uncommon to Nevada and New Jersey: diversity. Other than gambling, Nevada and New Jersey possess no qualities that attract tourism. This may explain why visitors to those states remain in hotel casinos while local shops and restaurants suffer.<sup>242</sup> Conversely, if the state of Florida legalized casinos in order to allure tourists, Orlando and South Florida attractions would provide the essential assortment of entertainment to entice visitors to remain longer within the state to fully explore its attributes.

In light of the fact that casinos could provide a solution to Florida's bleak economy by creating 50,000 jobs, spurring \$2.2 billion in new investment, and doubling the tourist trade to \$6.6 billion per year,<sup>243</sup> the state's only option in response to its inability to tax the revenue from Indian gaming is to legalize and regulate casinos within the state. As proven in Atlantic City, the absence of political pressure, along with the strict enforcement of tough regulations, should adequately deter the negatives associated with casino gambling. Therefore, Floridians, who hold the key

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costs and regulation fees, plus a tax to supply about \$800 million in loans over the next 20 years to build low-cost housing. *Id.* Furthermore, each casino hotel employs an average of 3600 people. *Id.*

237. Von Drehle, *supra* note 230, at A1.

238. *Id.*

239. *Id.*

240. *Id.* From the hotel waiter to the CEO, the state investigates criminal histories, character, integrity, honesty, and finances. *Id.* Furthermore, administrators are required to completely disclose all holdings, shareholders, bonds, and five years of IRS records. Von Drehle, *supra* note 230, at A1.

241. *Id.*

242. Von Drehle, *supra* note 234, at A7. The average visitor to Atlantic City, who lives less than 150 miles away, stays seven hours and spends \$66 dollars. *Id.*

243. Von Drehle, *supra* note 229, at A1.

to a prosperous future, should undoubtedly amend article X, section 7 of the Florida Constitution<sup>244</sup> in order to provide for the authorization of casino gambling.<sup>245</sup>

### VIII. CONCLUSION

The State of Florida has consistently reduced its constitutional stronghold against gambling when faced with economic crises. As a result, Florida permits pari-mutuel wagering and a state-operated lottery. In light of the fact that the state, with its inability to tax Indian gaming, has foregone a substantial amount of revenue desperately needed for a diminished economy, Florida should once again diminish its stronghold against gambling by legalizing the exact games it is currently trying to prohibit.

*Eugene Neimy Bardakjy*

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244. See article X, section 7 of the Florida Constitution, which provides: "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state." FLA. CONST. art. X, § 7.

245. See *supra* text accompanying note 37.

### PART III

## THE EXECUTIVE

*Although all state governors must be willing to make some compromises if they hope to win passage of their programs, the Florida Constitution makes our governors particularly dependent. Our state's "weak-governor" approach has been the subject of both praise and scorn, and is the focus of the third part of our Symposium.*

*Political scientist Jon Mills begins the discussion by examining the Governor's budgetmaking powers and the large role played by the Legislature in the setting of fiscal priorities. Next, attorney Stephen T. Maher examines the Florida Cabinet, the bane at one time or another of every Florida governor, and calls for further study before a decision is made to either keep or abolish this most unique of government institutions. Finally, Nova Law Review staff member Anthony J. Scaletta looks at the one area where the Constitution leaves no doubt that the Governor is supreme: the Florida militia.*

# Battle of the Budget: The Legislature and the Governor Fight for Control

**Jon Mills\***

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\* Director, Center for Governmental Responsibility, University of Florida College of Law; B.A. 1969, Stetson University; J.D. 1972, University of Florida College of Law. The author thanks John Thompson and Monta King for their research and hard work on this article.

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## I. INTRODUCTION

Conflicts between the Legislative and the Executive branches on fiscal issues are a tradition as old as the separation of powers.<sup>1</sup> Conflicts have occurred at the federal and state levels over the power of the purse. In the early 1970's, substantial litigation occurred over the issue of "impoundment"<sup>2</sup> by the Executive. The litigation addressed whether the Executive, in particular President Nixon, had abused its constitutional authority and violated the separation of powers doctrine.<sup>3</sup>

The battle between the Legislative and Executive branches in Florida regarding impoundment has focused on the exercise of the line item veto<sup>4</sup> and the Governor's budget reduction power.<sup>5</sup> The new section 19 of article III was enacted with the hope of resolving the controversy and uncertainty surrounding the Legislative and Executive conflicts over the budget.<sup>6</sup> Even the commission proposing the budget reforms of 1992, the Tax and Budget

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1. The separation of powers doctrine prohibits any branch of the state government from encroaching upon powers of another and prohibits any branch from delegating to another branch its constitutionally assigned powers. *See* FLA. CONST. art. II, § 3.

2. The term "impoundment" is applied to situations in which the Executive declines to enter into obligations or commitments for the full amount appropriated by the Legislature. Decisions to impound are made by the Executive branch alone through the use of closed meetings and confidential information. *See generally* L. Harold Levinson & Jon L. Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 615 (1974).

3. *See generally id.* (for discussion of presidential discretion during execution of appropriations with a focus on President Nixon).

4. "The governor [of] Florida has the [line] item veto only over appropriations bills. This permits him to veto a part of an appropriations bill rather than the entire bill." MANNING J. DAUER, *FLORIDA'S POLITICS AND GOVERNMENT* 147 (2d ed. 1984).

5. *See infra* notes 17-27 and accompanying text.

6. *See* FLA. CONST. art. III, § 19.

Reform Commission ("TBRC"), originated out of conflict.<sup>7</sup> The TBRC is at least partially a result of the services tax conflict and the desire to create a less political forum for major tax and budget reforms.

The goal of demystifying the rituals of the appropriations and budget process is laudable. Undoubtedly, the leaders in the appropriations process found power in complexity, detail, and obscurity.<sup>8</sup> The Executive's power to control the implementing process<sup>9</sup> and the scope of the line item veto has been attacked. Section 19 embodies the constitutional efforts to achieve a reasonable balance and to open the process to public scrutiny.

Much of section 19 deals with procedural improvements and budget policy issues including clarifying annualized costs, clarifying the format of appropriation bills, establishing a planning and appropriation process for agencies, providing a 72-hour viewing period for the appropriations bill, providing a final budget report, reducing the use of trust funds, establishing a schedule to increase the budget stabilization fund (the working capital fund), and expanding the importance of planning in the budget process.<sup>10</sup> While many of these provisions will have an impact on the clarity of the budget process and on important policy issues, such as an inadequate working capital fund<sup>11</sup> and excessive reliance on trust funds, the major task will be redefining the Legislative/Executive relationship embodied in subsections (b) and (h) of section 19 and the closely related article IV, subsection (13), also proposed by the TBRC. These provisions redefine the nature of the line item veto and the process for budget reductions in the event of shortfalls. Each of these related issues has been the subject of litigation between the Executive and Legislative branches in the last decade.

The constitutional revisions have not ended the battle. In fact, the Governor recently vetoed a bill proposed by the Legislature to implement section 19.<sup>12</sup> This bill would have allowed a legislative committee to revise Executive agency budget requests. The Governor vetoed the bill, stating that it was unconstitutional to allow a legislative committee to alter

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7. The author was Speaker of the House during the services tax controversy and when the Legislature passed the Resolution creating the TBRC.

8. The author observed this conflict when he chaired the two different Appropriations Subcommittees in the Florida House of Representatives.

9. See *Chiles v. Children*, 589 So. 2d 260 (Fla. 1991) (statute authorizing Executive Branch Commission to take steps to reduce state agency budgets to prevent deficit violated separation of powers doctrine).

10. FLA. CONST. art. III, § 19.

11. Eckl, *Planning Ahead with Budget Stabilization Funds*, THE FISCAL LETTER, March/April 1990, Vol. XII, No. 2, at 6 [hereinafter Eckl].

12. FLA. S. JOUR. 1608 (Reg. Sess. 1993).



the product of an officer of the Executive branch. In his veto message, the Governor stated, "[c]ommittee substitute for Senate Bill 1692 represents a substantial and serious intrusion into the executive powers long recognized in this state and recently recovered for the executive by the citizens of this state."<sup>13</sup> The recently recovered Executive power referred to in the veto message is section 19. Regardless of the constitutional revisions, the battle continues.

This article describes the policy changes and the history of section 19 and focuses on the continuing conflict between the branches surrounding the veto and budget reduction process. The battle between Florida's Legislative and Executive branches is sure to continue during the implementation of section 19. Even when section 19 is implemented, the effectiveness of the reforms can only be assessed after several years of experience. However, preliminary analysis indicates serious difficulties with some of the reforms.

## II. SUMMARY OF THE GOALS OF SECTION 19

### A. *The Tax and Budget Reform Commission (TBRC)—Context for Reform*

Section 19 is the focal point of some of the bolder initiatives of the TBRC. Some understanding of the history of the Commission is useful to evaluate its proposals. The Commission was created to separate fiscal issues into the equivalent of a mini-constitutional convention.<sup>14</sup> The hope was to allow reform of budget and fiscal matters and to modernize Florida's Constitution with less political pressure than the Legislature would encounter and with more deliberation than is generated by initiative petition.<sup>15</sup>

According to constitutional mandates,<sup>16</sup> the TBRC was politically balanced by a split of appointments and voting procedures were formulated

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13. Letter from Governor Lawton Chiles to the Honorable Jim Smith (May 3, 1993) (delivering veto message).

14. See FLA. CONST. art. XI, § 6; H.R.J. Res. 1616 (1988).

15. The initiative petition is a method of amending the constitution. The amendment is written out in the same form as it would appear if added to the constitution. It is then placed on a petition and circulated for signatures of registered voters. If sufficient signatures are secured at least 90 days before the general election, the amendment is placed on the ballot. To be added to the constitution, the amendment must win a majority of the votes cast on the amendment. See DAUER, *supra* note 4, at 100; see also FLA. CONST. art. XI, § 3.

16. See FLA. CONST. art. XI, § 6.

to prevent radical reforms.<sup>17</sup> Additionally, the election of a republican Governor and the continuance of democratic control in the Legislature further diversified the TBRC, probably to a greater extent than the drafters of the TBRC amendment envisioned. This diversity is reflected in article III, section 19, which adopted fiscal conservatism along with several progressive budget and planning policies.

One progressive aspect of section 19, apparently unique to Florida, is the constitutional linkage of planning to budgeting.<sup>18</sup> This section requires plans to be used as budgetary tools. The current administration is using the agency strategic plans as a basis for the agency budgets.<sup>19</sup>

### B. *Provisions and Goals of Section 19*

To aid with the future interpretation of section 19, the TBRC passed a resolution articulating its intent behind each provision.<sup>20</sup> The basic goals of the section are outlined below:

#### 1. To Formulate an Open and Understandable Budgeting Process for the Benefit of the Public

The Commission repeatedly stated that it intended for section 19 to provide an "open and easily understood budgeting process"<sup>21</sup> in order to "increase the ability of the citizens of Florida to understand where money

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17. Eleven members are selected by the Governor, seven members are selected by the Speaker of the House, and seven members are selected by the President of the Senate. None of these members may be a member of the Legislature at the time of appointment. Four non-voting *ex-officio* members must be members of the Legislature at the time of their appointment. Two members are selected by the Speaker and two members are selected by the President of the Senate. One appointment by each shall be a member of the minority party.

To place a measure on the ballot, the Commission must achieve a greater-than-majority vote. Specifically, two-thirds of the members of the full Commission must concur as well as a majority of the appointees of the Governor, a majority of the members appointed by the Speaker and a majority of the members appointed by the President of the Senate. FLA. CONST. art. XI, §§ 6 (a), (c).

18. Telephone Interview with Ron Snell, Budget Analyst, National Conference of State Legislatures (August 19, 1993).

19. Telephone Interview with Robert Bradley, Deputy Director, Office of Planning & Budgeting, Office of the Governor (August 19, 1993).

20. Tom L. Rankin, Chairman of the Taxation and Budget Reform Commission, Resolution of the Taxation and Budget Reform Commission (August 9, 1993) [hereinafter Resolution].

21. *Id.* at 2.

for state expenditures comes from, how that money is appropriated, what goals are being met by that appropriation, how that money is eventually spent, and the results achieved.”<sup>22</sup> Section 19 attempts to achieve this goal though several basic changes in the budgeting process including:

*a. Annual Budgeting:* The Commission stated in its Resolution on section 19 that it intends to “ensure that Florida maintains an integrated planning and budgeting system.” To this end, the TBRC suggested that the state use an annual budgeting and planning process.<sup>23</sup>

*b. Appropriation Bills Format:* The Commission suggested that the state use a single General Appropriations Bill, rather than multiple appropriation bills, in order to avoid having multiple bills which exceed available revenue.<sup>24</sup> However, the single appropriations bill is to contain separate sections for a variety of major programs including education, the criminal justice system, and environmental protection.<sup>25</sup> The most significant aspect of this change in bill format is the Commission’s explicit recognition of the Governor’s power to apply a line item veto to substantive bills containing appropriations.<sup>26</sup>

*c. Appropriation Review Process:*<sup>27</sup> The Commission stated that the Legislature should adopt a formal review process which requires the appropriate subcommittee of the Appropriation Committee of each house to review each department’s or agency’s budget request. These requests should be compared to the major issues in each department’s or agency’s planning document and to the major issues in the Governor’s recommended budget for the department or agency.<sup>28</sup>

*d. Seventy-Two Hour Public Review Period:*<sup>29</sup> The Commission implemented a seventy-two hour public review or “cooling off” period, in

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22. *Id.* at 3.

23. *Id.* at 2. Additionally, “state agency Legislative Budget Requests, the Governor’s Recommended Budget, and Appropriation Bills should be accompanied by detailed data reflecting the annualized costs of the budget.” Each agency should use the state plan and all relevant agency planning documents to develop its budget request. *Id.*

24. Resolution, *supra* note 20, at 2.

25. *Id.* at 2, 3.

26. See *supra* text accompanying note 15 for further discussion of this issue.

27. Resolution, *supra* note 20, at 2.

28. *Id.* at 4.

29. *Id.*

which the Conference Report on the General Appropriation Bill is to be made available to the Legislature and to the general public. The TBRC implemented this review period to allow the public and the Legislature the necessary time to read and understand the merits of the policies contained in the Conference Report. However, substantive bills containing appropriations are specifically excluded from this mandatory review period.<sup>30</sup>

*e. Final Budget Report.*<sup>31</sup> The Commission required the preparation of a final budget report within ninety days of the beginning of each fiscal year. This report should include the following: all appropriations approved by the Governor, whether in substantive bills or in the General Appropriation Bill; the net appropriations for each budget item; the actual expenditures for preceding fiscal years; the estimated expenditures for the current fiscal year; the estimated revenues and cash balances for the current fiscal year; and the final budget, expenditures, and revenues by department or agency and major program areas.<sup>32</sup>

## 2. Establish Planning as a Fundamental Part of Budgeting

Florida has been a national trendsetter in the use of planning as a budgeting tool.<sup>33</sup> Perhaps because of Florida's rapid growth, the need was more apparent and the political will more available than in other states. The State Comprehensive Plan<sup>34</sup> is designed as the blueprint to the state's future. Other legislation, such as the Growth Management Act,<sup>35</sup> also adds to the overall commitment to planning in Florida. However, the TBRC noted that Florida has not reached all of its planning goals.<sup>36</sup>

Florida's new effort to incorporate planning in the budgeting process includes appointing the State Plan Growth Management Advisory Committee to propose legislation to improve the state plan. The intent of the Committee is to clarify state land development goals and objectives.<sup>37</sup> These

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30. *Id.* at 5.

31. *Id.*

32. Resolution, *supra* note 20, at 5, 6.

33. THE SPEAKER'S ADVISORY COMMITTEE ON THE FUTURE, THE SUNRISE REPORT (1987).

34. FLA. STAT. ch. 187 (1991).

35. FLA. STAT. §§ 163.3161-163.3243 (1991).

36. Florida Taxation and Budget Reform Commission, *A Program for Reform of Florida Government*, (February, 1991) at 25.

37. Fla. Exec. Order No. 93-217 (1993); FLA. STAT. § 186.009 (1993).

legislative proposals will be part of an overall effort to implement the section 19 provisions related to planning.

### 3. To Increase Working Capital Reserves to Promote Stability and Responsibility

The purpose of this subsection is to expand Florida's "rainy day fund" to make budget shortfalls easier to manage. Some other states are implementing such increases as well. However, fiscal problems and political disagreement on the proper extent and proper use of these funds is likely to prohibit significant increases in other states' budget reserve funds in the near future.<sup>38</sup>

Wall Street analysts recommend that states "maintain budget reserves equal to five percent of the state's general fund to cushion state finances against unforeseen fiscal problems."<sup>39</sup> Although section 19 does not mandate that Florida fall within this suggested amount immediately, the TBRC set basic guidelines for reaching the goal of five percent by fiscal year 1998-1999.<sup>40</sup> Similarly, most other states do not have sufficient rainy day funds. At the end of fiscal year 1989, eight states had funds with a zero balance, twenty-five states had funds with less than three percent of their general fund budgets, and only four states had balances of five percent or more.<sup>41</sup> Although state reserves are difficult to maintain, especially at the suggested five percent level, most state officials recognize their importance. In Florida, for example, the TBRC mandated that the fund increase to five percent by 1998 because the state has experienced budget shortfalls<sup>42</sup> and inaccurate budget estimates in the past. The TBRC acknowledged the importance of this fund for effective future budget management.

### 4. To Reduce the Use of Trust Funds

Trust funds constitute a significant segment of the Florida budget. Trust funds raise policy concerns because they are less visible and less scrutinized than general revenue funds. Earmarking revenue by placing it in a trust fund is thought to inhibit revenue sources for general government priorities.

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38. Eckl, *Rainy Day Funds*, 1 NCSL Legisbrief No. 9 (March, 1993).

39. *Id.*

40. Resolution, *supra* note 20, at 8.

41. Eckl, *supra* note 11, at 6.

42. See Resolution, *supra* note 20, at 8.

## 5. To Facilitate Budget Reductions by the Executive

The TBRC specifically stated its intent to overrule *Chiles v. Children*,<sup>43</sup> viewing that decision as a constraint on Executive power to control budget reductions. The Commission's intent was to increase the Governor's power to implement budget reductions. Section 19 specifies that reductions adhere to agency planning documents which will prioritize programs for possible cuts.<sup>44</sup>

Additionally, the new section 13 of article IV specifically refers to revenue shortfalls. This section empowers the Governor and Cabinet to "establish all necessary reductions in the state budget"<sup>45</sup> to comply with the balanced budget requirements of article VII.<sup>46</sup> Section 13 allows the Legislature to define "revenue shortfalls."<sup>47</sup>

## 6. To Facilitate Executive Line Item Vetoes

Section 19 specifically expands the Executive authority to line item veto appropriations. Beginning July 1, 1994, section 19 requires the Legislature to itemize every "specific appropriation" over one million dollars.<sup>48</sup> This section increases the number of line items available for veto. Additionally, section 19 subjects substantive bills (other than the general appropriations bill) to the Executive's veto power for the first time.<sup>49</sup>

While a primary purpose of section 19 was to increase the Governor's line item veto power,<sup>50</sup> the section's effect may be to micro-manage the budget. Literally read, implementation of these changes in the line item veto process is impossible. For example, large segments of the budget, such as the funding formula for public schools, are not amenable to division into line items.<sup>51</sup>

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43. 589 So. 2d 260 (Fla. 1991).

44. FLA. CONST. art. III, § 19(h).

45. *Id.* art. IV, § 13.

46. *Id.* art. VII, § 1(d).

47. *Id.* art. IV, § 13.

48. *Id.* art. III, § 19(b).

49. FLA. CONST. art. III, § 19(b).

50. Telephone Interview with Robert Bradley, Deputy Director, Office of Planning & Budgeting, Office of the Governor (August 19, 1993).

51. The Florida Education Finance Program is distributed to school districts through a complex formula which is applied to a lump sum appropriation.

### III. OTHER BUDGET-RELATED PROVISIONS OF THE FLORIDA CONSTITUTION: A PERSPECTIVE OF FLORIDA'S BUDGET PROCESS

Part of the drive for budget reform was generated by the overall constraints and parameters of Florida's Constitution. Florida relegates a fairly small role for the Executive in the budgeting process in comparison to other states. California, for example, authorizes its Governor to reduce appropriations in the veto process.<sup>52</sup> The Florida Supreme Court has held that such a reduction specifically violates the separation of powers provision of Florida's Constitution.<sup>53</sup>

Additionally, prior to the adoption of section 19, article III, section 8 prohibited the Governor from vetoing specific appropriations unless those appropriations were contained in a "general appropriations bill."<sup>54</sup> This provision prohibited the Governor from modifying and amending substantive legislation containing appropriations. If the Governor wished to veto the appropriation provision, section 8 required that he/she veto the entire bill. Section 19 drastically changes this policy and allows line item vetoes in substantive bills.<sup>55</sup>

Although section 19 significantly alters Florida's budgeting process, other forces continue to limit tax sources and to constrain spending. First, Florida is one of only ten states which virtually prohibits a personal income tax.<sup>56</sup> During the debate which preceded the adoption of TBRC's resolution on section 19, some legislators expressed a desire that the TBRC submit a modification of the income tax restriction to the public. The TBRC, however, did not focus on this issue. Instead, the Commission concentrated on addressing spending controls and budget policies.

A second fiscal policy which remains unchanged by section 19 is the article VII, section 1(d) requirement for a balanced budget. Unlike some other states, Florida cannot deficit finance. No groundswell of support exists for modifying this policy.

Third, Florida continues to prohibit using appropriation bills to modify substantive policy.<sup>57</sup> The purpose of this prohibition is to confine substantive policy making to individual bills. Individual bills must comply with the

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52. CAL. CONST. art. IV, § 10(e) ("The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill.").

53. FLA. CONST. art. II, § 3; *Chiles v Children*, 589 So. 2d 260 (Fla. 1991).

54. FLA. CONST. art. II, § 8(a).

55. *Id.* § 19(b).

56. *Cutting Expenses Will Make Nest Egg Last*, THE ORLANDO SENTINEL, July 18, 1993, at F2.

57. FLA. CONST. art. III, § 7.

single subject rule, and, therefore, must be separately scrutinized in the legislative process.<sup>58</sup> To allow substantive statutory amendments in an appropriation bill would allow logrolling and inclusion of multiple subjects in one bill.<sup>59</sup>

Conflict over managing the budget has ensued over the last decade. The issues of veto power and budget control were fought out in the courts. Those battles set the playing field for the TBRC reforms of 1992.

#### IV. SEPARATION OF POWERS, VETOES AND BUDGETING IN FLORIDA COURTS

Two major sources of budget controversy have generated litigation on budget issues in Florida. First, the recurrent controversy over the extent of the Governor's authority to line item veto appropriations, and second, the less frequent circumstance of administrative budget reductions in the case of revenue shortfalls.<sup>60</sup> The TBRC sought to address both these controversies in its section 19 amendment to article III of the Florida Constitution.<sup>61</sup> While section 19 does speak directly to these issues, much controversy still exists regarding the Governor's power to line item veto and to correct for budgetary shortfalls.

##### A. *The Line Item Veto Power Prior to the Enactment of Section 19*

Prior to the enactment of section 19, the Governor's line item veto authority was based solely on the language of article III, section 8, which states, "[i]n all cases except general appropriations bills, the veto shall extend to the entire bill. The Governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates."<sup>62</sup> The terms "general appropriation bill" and "specific appropriation" are not defined in section 8. Consequently, the definitions of each of these terms became the subject of litigation and were finally addressed by the Florida Supreme Court.

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58. *Id.* § 6.

59. Of course, some may correctly argue that large appropriation bills have a major substantive effect.

60. *See supra* text accompanying notes 17-27.

61. *See infra* notes 110-128 and accompanying text. The TBRC sought specifically to overrule *Chiles v. Children* and to strengthen Executive authority.

62. FLA. CONST. art. III, § 8(a).



## 1. Defining "Specific Appropriation"

In *Brown v. Firestone*,<sup>63</sup> the court discussed generally the limits of the Governor's line item veto power and defined the term "specific appropriation."<sup>64</sup> In *Brown*, the Governor vetoed appropriation provisions which included legislation on other subjects in contravention of article III, section 12 of the Florida Constitution (the single subject requirement).<sup>65</sup> The court characterized the Governor's veto power as "a negative power, the power to nullify, or at least suspend, legislative intent. It is not designed to alter or amend legislative intent."<sup>66</sup> Thus, the court determined that any exercise of veto power over an appropriation destroys that appropriation and that the Governor could not redirect the appropriation to another recipient.<sup>67</sup> According to the court, the framers of the 1968 Florida Constitution sought to avoid creative use of the gubernatorial veto by controlling "the expenditure of funds unless the governor was willing to forsake the funds appropriated along with the legislative direction."<sup>68</sup>

The court in *Brown* also considered the intended meaning of "specific appropriation."<sup>69</sup> It found that the terms "line item" and "specific appropriation" are identical, stating "[a] specific appropriation is an identifiable, integrated fund which the legislature has allocated for a specified purpose."<sup>70</sup> According to the court, each "fund" meeting this description was subject to the line item veto power.<sup>71</sup>

The court later refined its definition of "specific appropriation" in *Martinez v. Florida Legislature*.<sup>72</sup> The court found that language in the Legislature's statement of intent was not part of the appropriation bill, and therefore, not a specific appropriation.<sup>73</sup> In addition, the court found that these statements were not binding upon the Executive and were only

63. 382 So. 2d 654 (Fla. 1980).

64. *Id.*

65. *Id.* The supreme court held that mandamus was the proper mechanism to challenge the constitutionality of appropriations acts rather than to veto them. *Id.* at 662 (citing *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971) and *Division of Bond Finance v. Smathers*, 337 So. 2d 805 (Fla. 1976)).

66. *Id.* at 664. It is important to note that other states allow budget reductions.

67. *Brown*, 382 So. 2d at 664-65.

68. *Id.* at 667.

69. *Id.* at 668.

70. *Id.*

71. *Id.*

72. 542 So. 2d 358 (Fla. 1989).

73. *See id.* at 361-62.

directive in nature.<sup>74</sup> Consequently, *Martinez* held that the Executive had no authority to veto the intent language.<sup>75</sup>

In *Florida House of Representatives v. Martinez*,<sup>76</sup> the court evaluated several line item vetoes in the 1989 appropriations bill. In continuing to interpret the term “specific appropriation,” the court stated that in order to veto “proviso” language in an appropriation bill, “that language *on its face* must create an identifiable integrated fund—an exact sum of money—that is allocated for a specific purpose.”<sup>77</sup>

Among the challenged vetoes were a provision that authorized exceeding the standard pay grade for certain salaried officials without providing a funding amount, a provision setting forth conditions under which certain workers could redeem unused annual leave credits on termination of employment without identifying a sum of money, and a provision providing for the treatment benefits for alcohol dependency for members and employees of the State Legislature without specifying a sum of money funded.<sup>78</sup> The court found the veto of these provisions unconstitutional because none of these provisions met the court’s definition of “specific appropriation” requiring an identifiable sum of money.<sup>79</sup>

The court in *Florida House* also addressed a \$4 million appropriation which the Legislature divided into two parts. The first part of the appropriation was specifically designated, but the second part was identified only as the “remainder.”<sup>80</sup> The Governor sought to veto the second part of the appropriation.<sup>81</sup> The court found that this was an acceptable veto because the source and amount of the funding were readily discernible.<sup>82</sup> According to the court, the appropriation met the *Brown* definition of “specific appropriation” because it constituted an “integrated identifiable fund allocated for a specified purpose.”<sup>83</sup>

In another challenged veto in the same case, the court found that the Governor could not use the line item veto to eliminate specific funding sources from a single appropriation item, leaving the line item partially

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74. *Id.* at 362.

75. *Id.*

76. 555 So. 2d 839 (Fla. 1990).

77. *Id.* at 844.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Florida House*, 555 So. 2d at 844.

82. *Id.*

83. *Id.* at 844-45.

funded.<sup>84</sup> Stating that the Governor “must veto all or none” of such appropriations,<sup>85</sup> the court found that this veto violated the legislative intent to spend a certain amount of money for a certain purpose.<sup>86</sup> The court reiterated the position that a line item veto could not partially reduce an appropriation. In this instance, the veto would have partially reduced the *sources* of funding, thereby reducing the appropriation. The court believed that vetoing part of a funding source for a line item would be equivalent to vetoing part of a “specific appropriation” or editing a specific appropriation, a clear violation of the then-existing constitutional provisions.<sup>87</sup>

## 2. Defining “General Appropriation”

In addition to defining “specific appropriation,” the court also defined the term “general appropriation” within the context of article III, section 8. In *Thompson v. Graham*,<sup>88</sup> the legislation question amended statutes and authorized and provided funding for specific public education capital outlay (PECO) projects. Governor Robert Graham vetoed several of the specific appropriations. As a result, the House of Representatives filed a petition for writ of mandamus, arguing that the PECO bill was not a “general appropriations bill.” Examining the legislation, the court noted that the PECO bill was an act “authorizing and providing funding for specified public educational capital outlay projects,” and found that it was indeed a general appropriation bill for the purposes of the veto power.<sup>89</sup> The court further noted that although only one section of the bill provided funding authorization, this section contained eighty-six specific items authorizing the expenditure of over a half billion dollars.<sup>90</sup> The court rejected the House of Representatives’ argument that the appropriations were merely “incidental” to the legislation and approved the Governor’s line item veto.<sup>91</sup>

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84. *Id.* at 845-46 (emphasis added).

85. *Id.* at 845. “If the legislature’s purpose is to expend a specific amount of money for a single stated purpose, then the governor has no authority to reduce that amount by vetoing one of several funding sources. The governor must veto all or none.” *Florida House*, 555 So. 2d at 845.

86. *See id.*

87. *See* FLA. CONST. art. III, § 8.

88. 481 So. 2d 1212 (Fla. 1985).

89. *Id.* at 1214.

90. *Id.* at 1215.

91. *Id.* (distinguishing this case from *Bengzon v. Secretary of Justice*, 299 U.S. 410, 413 (1937), which held that general legislation might include provisions “carrying an appropriation as an incident”). Concurring in *Thompson*, Justice Boyd noted that, even though the funds for these PECO projects were provided by bonds, the bill would still be considered a

Justice Ehrlich, dissenting in *Thompson*, criticized the majority's broad definition of "general appropriation bill."<sup>92</sup> He argued that a general appropriation bill provided for payment of "salaries of public officers and other current expenses of the state."<sup>93</sup> According to Justice Ehrlich, the PECO bill did not provide for such payments, but only appropriated money for Florida's educational system. He determined that the PECO bill was an appropriation bill but that it did not meet the definition of a "general appropriation bill," and, therefore, was not subject to line item veto.<sup>94</sup>

The issue of whether line item vetoes should extend beyond general appropriation acts is raised by new language in section 19(b), where substantive bills containing appropriations are subject to the line item veto.

### B. Budget Reductions and the Separation of Powers

A revenue shortfall in the fiscal 1991-92 state budget of some \$621.7 million led to an order to revise budgets and reduce expenditures. This order was made pursuant to Florida Statutes, section 216.221(2), which provides:

If, in the opinion of the Governor, after consultation with the Revenue Estimating Conference, a deficit will occur in the General Revenue Fund, he shall so certify to the commission. The commission may, by affirmative action, reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund.<sup>95</sup>

Controversy ensued over the Governor's proposed budget reductions. This controversy resulted in litigation challenging the constitutionality of the actions of the Governor and Cabinet and the constitutionality of section 216.

The Florida Supreme Court, in *Chiles v. Children*,<sup>96</sup> found that section 216.221(2) violated the separation of powers doctrine, and thus was

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"general appropriation." Citing article XII, section 9(a)(2), which says that bonds may be issued and their proceeds expended only by authorization of the legislature, Justice Boyd concluded that the authorizations were "appropriations of state taxpayers' money to the state budget for the purpose of meeting the current expenses of the state" whether the money was to come from current revenues or bond proceeds to be repaid by future revenues. *Id.* at 1216-17 (Boyd, J., concurring).

92. *Thompson*, 481 So. 2d at 1219-20 (Ehrlich, J., dissenting).

93. *Id.* at 1220 (quoting *Amos v. Mosley*, 77 So. 619, 623 (Fla. 1917)).

94. *Id.*

95. FLA. STAT. § 216.221(2) (1991).

96. 589 So. 2d 260 (Fla. 1991).

unconstitutional.<sup>97</sup> The court also found that the statute conflicted with article III, sections 1 and 7, which grant to the Legislature the responsibility of passing bills into law, and article VII, sections 1(c) and (d), which require a balanced budget.<sup>98</sup> The court noted that it “has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes.”<sup>99</sup> Furthermore, the court stated that the power “to reduce appropriations, like any other lawmaking, is a legislative function.”<sup>100</sup> The court recognized that the Governor was constitutionally prohibited from using his veto power to alter or amend appropriations. Accordingly, the court held that the Legislature was prohibited from abandoning its legislative responsibility through delegation.<sup>101</sup>

The court distinguished its holding regarding budget deficits from cases addressing the legislative delegation of authority to the Executive branch in order to dispose of surplus funds.<sup>102</sup> The court stated that in the case of surpluses, the legislative mandates in appropriations had to be met before the Executive branch could act.<sup>103</sup> In the case of deficits, however, “the facts indicate that entities of state government will not even be able to fulfill their legal responsibilities. Moreover, there is no express legislative policy that is being carried out. It is, in fact, the Commission which is setting policy.”<sup>104</sup> In the event that a shortfall would be imminent under the then-unconstitutional section 216, the court asked the attorneys in *Chiles* to suggest some available options. The attorneys offered a variety of

97. *Id.* at 268. Several constitutional provisions are implicated by *Chiles v. Children*.

Florida Constitution article II, section 3 provides: “The powers of the state government shall be divided into legislative, executive and judicial branches. *No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided* [by the constitution].” *Id.* at 263-64 (quoting FLA. CONST. art. II, § 3) (emphasis added).

Florida Constitution article VII, section 1(c) provides: “[N]o money shall be drawn from the treasury except in pursuance of appropriation made *by law*.” *Id.* at 264 (quoting FLA. CONST. art. VII, § 1(c)).

Florida Constitution article VII, section 1(d) provides: “[P]rovision shall be made *by law* for raising sufficient revenue to defray the expenses of the state for each fiscal period.” *Id.* at 264-65 (quoting FLA. CONST. art. VII, § 1(d)).

98. See *Chiles*, 589 So. 2d at 264-65.

99. *Id.* at 265 (citing *State ex rel. Davis v. Green*, 116 So. 66, 69 (Fla. 1928)).

100. *Id.* (citing *Florida House of Representatives v. Martinez*, 555 So. 2d 839, 845 (Fla. 1990)).

101. *Id.* at 265.

102. *Id.* at 267.

103. *Chiles*, 589 So. 2d at 267.

104. *Id.*

suggestions ranging from the position that the Governor could do nothing to the position that the Governor could act reasonably under emergency powers to balance the budget.<sup>105</sup>

The court went on to suggest that it might be permissible for the Legislature to allow the Executive branch to respond to budget crises, but specified that any such delegation of functions must be accompanied by "sufficient guidelines to assure that the legislative intent is clearly established and can be directly followed . . . ."<sup>106</sup> Under this interpretation, the delegation must be accompanied by specific guidelines.<sup>107</sup> These guidelines must indicate the amount of possible reductions, prioritize the reductions, and provide for some legislative control or oversight.<sup>108</sup> Such guidelines were included in amendments to section 216 which were enacted after *Chiles*, but before the enactment of section 19.<sup>109</sup>

Dissenting in *Chiles*, Justice McDonald stated that Florida Statutes section 216.221 is a statutory response to the constitutional mandate for a balanced budget in article VII, section 1(d).<sup>110</sup> He also stated that the Governor already has the responsibility under article IV, section 1(a) to execute the laws, including the balanced budget, and to ensure that no more money is spent than is taken in.<sup>111</sup>

## V. THE FUTURE OF THE BUDGET BATTLE AFTER THE ENACTMENT OF SECTION 19

### A. *Line Item Veto Authority After Section 19*

The language of section 19 evidences a clear intent by the TBRC to increase the Governor's line item veto power. The section 19 requirement that the Legislature line item any appropriation over \$1 million is intended to increase Executive authority to veto line items—most particularly those which are termed "legislative turkeys." "Legislative turkeys" refer to those special projects which some view as wasteful pork barrel appropriations. The Legislature, therefore, is left with the practical problem, and now the

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105. The author was amicus curiae in *Chiles v. Children* and presented oral argument in the case.

106. *Id.* at 268.

107. *See id.*

108. *Id.*

109. *See supra* notes 29-32 and accompanying text (for the implications of the conflict).

110. *Chiles*, 589 So. 2d at 270 (McDonald, J., dissenting).

111. *Id.* at 270-71.

constitutional duty, to define "specific appropriation." While the supreme court has previously offered such a definition, that definition may not suffice under the new constitutional language.

Pragmatically, using the line item on every one million program in a thirty billion budget is impossible. Additionally, such a requirement will surely result in both inefficient and ineffective management. In all states, "[s]ignificant portions of state operating budgets are uncontrollable. Entitlement and mandates mean that services must continue in some capacity regardless of performance."<sup>112</sup> Line item budgeting is not pragmatic for these entitlement programs and will not accomplish the goal of cutting government costs. The challenge will be to design legislation which will meet the purposes of the TBRC, pass the Legislature, and be acceptable to the Governor.

Another important controversy will arise under the new ability of the Governor to partially veto appropriations in legislation other than a general appropriation bill.<sup>113</sup> This provision radically departs from the former restriction prohibiting line item vetoes in substantive bills which include appropriations. This concept also directly contravenes the logic of the cases which vehemently denied the authority of the governor to partially veto a policy and let the rest of the policy stand.<sup>114</sup>

## B. Budget Reductions After Section 19

The TBRC directly addressed the conflict between the Legislative and Executive branches represented by the various line item veto cases and by the budget reduction controversy. The Commission specifically referred to *Chiles* and declared its intent to reverse the case in order to vest authority for budget reductions in the Governor and the Cabinet, consistent with the provisions of section 19.

The statement of intent to reverse *Chiles* has limited practical effect because section 10 controls the budget reduction process, which effectively invalidates the authority of *Chiles* on the issue. *Chiles* is no longer the authority for evaluating budget reductions; section 19 specifically controls that process. *Chiles* simply found that the existing statutes for budget reductions were unconstitutional as a violation of separation of powers.<sup>115</sup>

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112. Hayes, *The Performance Budget Revisited: A Report on State Budget Reform Initiatives* at 7 (July 1993).

113. See FLA. CONST. art. III, § 19.

114. See, e.g., *Florida House of Representatives v. Martinez*, 555 So. 2d 839 (Fla. 1990).

115. See *Chiles*, 589 So. 2d at 268.

The language of section 216.221 created an unconstitutional, overbroad delegation of authority to the Executive branch. The language of section 216.221 delegated authority to the Administration Commission<sup>116</sup> to reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund.<sup>117</sup> State agencies, for purposes of fiscal affairs, include all budget entities other than the Legislature.<sup>118</sup> Reducing the budget requires a majority vote of the Cabinet, which includes the Governor.<sup>119</sup>

The Florida Supreme Court has consistently maintained a strict separation of powers doctrine.<sup>120</sup> Accordingly, the court found the language of section 216.221 to be an overbroad unconstitutional delegation.<sup>121</sup> Section 216.221 required no legislative authorization of cutbacks, did not restrict the amount or percentages of the cuts, and required only that the cutbacks be sufficient to prevent a deficit.<sup>122</sup>

While section 216 relinquished broad discretion and authority to the Administration Commission, the court has consistently held that the Legislature must limit its delegation of authority *with specificity*. Following the standards of *Askew v. Cross Key Waterways*<sup>123</sup> and related cases, it is argued that the court should hold the Legislature to the rigorous standard required by the Florida Constitution in delegating the fundamental power of budget decisions.

Pursuant to the decision in *Chiles*, the Legislature passed revisions to chapter 216 which specify how reductions are to be carried out.<sup>124</sup> These provisions must now be read in conjunction with the new section 19. Together, the provisions substantially increase executive authority both by

116. The Administration Commission is composed of the Governor and the Cabinet.

117. See FLA. STAT. § 216.221(2) (1991).

118. See *id.* § 216.011(1)(kk).

119. *Id.* § 14.202 (1991).

120. See, e.g., *Orr v. Trask*, 464 So. 2d 131 (Fla. 1985); *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978); *Lewis v. Bank of Pasco County*, 346 So. 2d 53 (Fla. 1976).

121. See *Orr*, 464 So. 2d at 134-35.

122. NATIONAL CONFERENCE OF STATE LEGISLATURES, FISCAL AFFAIRS PROGRAM, Legislative Budget Procedures in the 50 States: A Guide to Appropriations and Budget Processes (1988). Examples include a binding requirement of approval by House and Senate Appropriations Committees in Michigan and Illinois, where cuts over two percent of total appropriations require approval of the full legislature. Some states grant authority to reduce the budget up to a set percentage. *Id.*

123. 372 So. 2d 913 (Fla. 1978).

124. See FLA. STAT. § 216.221 (1991).



accomplishing a constitutional delegation of authority and by placing expanded Executive authority in the Florida Constitution.

Section 19 does not suspend the operation of the separation of powers clause. Section 19 does, however, define the exercise of Executive authority in reductions and is likely to have a dramatic effect on the application of the separation of powers clause in budget reduction actions. The TBRC resolution discusses the need for expeditious action in shortfalls and, therefore, focuses on Executive action.<sup>125</sup>

Section 19 also specifies that reductions adhere to agency planning documents which will prioritize programs for possible cuts.<sup>126</sup> Furthermore, the new article IV, section 13 of the Florida Constitution specifically refers to revenue shortfalls and empowers the Governor and the Cabinet to "establish all necessary reductions in the state budget" in order to comply with the balanced budget requirements of article VII.<sup>127</sup> Section 13 does allow the Legislature to define "revenue shortfalls."<sup>128</sup> This provision provides an opportunity for the Legislature to limit Executive power by controlling when a shortfall occurs.

### C. Other Provisions

#### 1. Integration of Planning and Budgeting

The success of the efforts in section 19 to integrate planning and budgeting will depend in large measure on the cooperation of the Legislature and the Executive branch because section 19 does not compel appropriations to comply with plans.<sup>129</sup>

One critical problem with section 19 is the potentially destructive consequences of increased line item budgeting in appropriation bills. This effort, which was intended to increase the Governor's power to cut wasteful spending, runs contrary to trends in budgeting which accord increased discretion to program administrators. For example, in Massachusetts, so long as an agency does not overspend its budget and "service delivery groups" do not change by more than ten percent, an administrator can set

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125. See Resolution, *supra* note 20, at 11.

126. FLA. CONST. art. III, § 19(h).

127. See *id.* art. IV, § 13; *id.* art. VII, § 1(d).

128. See *id.* art. IV, § 13.

129. See Hayes, *supra* note 112, at 4 ("[A]greement on priorities and full cooperation in execution [of performance budgeting] will depend, however, upon local circumstances and personalities involved.").

on state budgeting noted that, “performance reform asks lawmakers to abandon traditional line item spending controls and allow managers to reallocate appropriations as conditions merit.”<sup>131</sup> The constitutional mandate of section 19 to increase line items appears to be contrary to this kind of management reform.

## 2. An Open and Accountable Process: Working Capital Requirements, Trust Fund Limitations and Simplification of the Process

The gradual increase of the working capital fund to five percent makes solid financial sense. Of course, pressure will increase in times of shortfall. However, by placing this provision in the constitution, meeting the reserve level is a mandate.

The series of issues dealing with establishing waiting periods for public review and clearer appropriation formats will help public understanding of the process. However, the Legislature must be committed as an institution to facilitating these reforms for them to make a major impact.

Limitation of trust funds has long been a goal of budget reformers. The number of trust funds in Florida will decline due to the continuing review process, and making enactment of future trust funds more difficult through the three-fifths vote requirement of each chamber of the Legislature.

## VI. CONCLUSION

The reforms of section 19 are the beginning of resolving the complex issues of budget policy rather than the end. Many provisions are not even effective as of 1993. Legislation implementing the reforms of section 19 will be the prime indicators of whether the provision will meet its goals of improved openness, understandability, and efficiency.

The most difficult goal to implement is integrating planning and budgeting. Solid implementing legislation and commitments from the leadership of the Legislature and the Governor are indispensable.

The most unpredictable outcome is the continuing controversy over line item vetoes and budget reductions. Again, implementing legislation is a key factor in achieving a balance of power, efficiency, and accountability. The most predictable outcome is that the Legislature and the Executive branch will continue to struggle over political control of the budget process.

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131. *Id.* at 10.

# The Florida Cabinet: Is it Time for Remodeling?

Stephen T. Maher\*

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## I. INTRODUCTION

Most people assume that, in the United States, the Executive branch of state government is controlled by the state's Governor. That assumption is not true in Florida. In Florida, the Governor shares executive power with other elected executive branch officials, a group designated in the state constitution as the Cabinet.<sup>1</sup> This "plural executive" form of organization has been described as an institution "unique" to Florida.<sup>2</sup> Is this system an advance worth examination by other jurisdictions or is it a detour on the road to good government that other jurisdictions have correctly ignored?

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\* Lawyer and legal educator. Chair of The Conference on the Florida Constitution, a joint program of the Administrative Law Section and the Council of Sections of The Florida Bar.

1. FLA. CONST. art. IV, § 4(a).

2. TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 65 (1991). Allen Morris, a longtime observer and commentator on Florida government, seems to concur with this assessment. "Since the Governor shares so much of the traditional executive responsibility with members of an independent Cabinet, it is not surprising that political scientists regard Florida's system of state government as different from virtually all other states." ALLEN MORRIS, *THE FLORIDA HANDBOOK* 1993-94 14 (24th Biennial ed. 1993). Some argue that Florida's Cabinet system is not that different from other states, noting that attorneys general, treasurers and secretaries of state at the state level are commonly elected. Fred O. Dickinson, Jr., *The Florida Cabinet*, 43 FLA. B.J. 337, 339 (1969). However, the role that cabinet officers play in Florida government is significantly different than the role played by similar officers in other states. Joseph W. Landers, Jr., *The Myth of the Cabinet System: The Need to Restructure Florida's Executive Branch*, 19 FLA. ST. U. L. REV. 1089, 1103 (1992) ("No other state has an executive branch that even resembles ours in Florida.").

## II. THE CABINET

The Florida Cabinet is part of the Executive branch, but it is not the Governor's Cabinet. Its members are not appointed by the Governor and they do not serve at the Governor's pleasure. Instead, members of the Cabinet are elected independently of the Governor on the same statewide ballot used to elect the Governor.<sup>3</sup> The Florida Constitution provides for a Cabinet that consists of six members: a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education.<sup>4</sup> The Florida Constitution and the Florida Statutes prescribe the powers and responsibilities of these offices.<sup>5</sup>

Cabinet members discharge some of their powers and responsibilities while acting individually; they discharge others while acting jointly with the Governor and Cabinet; and they exercise still others while acting with other cabinet officers. Where the constitution and statutes provide for a cabinet member to oversee a particular agency of government, that responsibility is discharged individually.<sup>6</sup> Where the law provides for the Governor and Cabinet to act together to manage an agency or to make certain decisions, cabinet members have a different role. As joint decisionmakers, each acts as a member of a collegial body chaired by the Governor. The Governor is technically not a member of the Cabinet, even when acting with it.<sup>7</sup>

The legal formula for sharing power in this collegial body changes depending on the type of question that the Governor and Cabinet must decide.

Under this system, the governor has no control over the cabinet other than that which comes from being the presiding officer, and, in most cabinet decisions, it is possible for the governor to be outvoted on a given issue. The governor is required to be in the majority for action on certain issues under the provisions of the constitution (such as clemency) or pursuant to statute (such as certain growth management issues), thus giving the governor veto power on those issues even

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3. FLA. CONST. art. IV, §§ 4, 5.

4. *Id.* § 4.

5. *See id.*; FLA. STAT. §§ 16 - 19 (1993).

6. The constitution provides certain specified responsibilities for cabinet members, FLA. CONST. art. IV, §§ 4, 5., and provides that the Legislature may place the administration of departments within the Executive branch under the Governor, the Lieutenant Governor, the Governor and Cabinet, a cabinet member, or an officer or board appointed by the Governor, except where otherwise provided in the constitution. *Id.* § 6.

7. MORRIS, *supra* note 2, at 13.

though three cabinet members must join the governor for a decision.<sup>8</sup>

In some situations, cabinet members can act jointly without the Governor. For example, confirmation by three members of the Cabinet can be a substitute for senate approval of appointment to or removal from a designated statutory office, if the statutes so provide.<sup>9</sup> Also, four cabinet members may send the supreme court a written suggestion that the Governor is incapable of serving as Governor.<sup>10</sup>

The Governor is not required to share all executive power with the Cabinet. One area where the Governor does not share executive power is in the area of appointments. It has been estimated that the Governor makes about 4,000 appointments over the course of a four year term.<sup>11</sup> The Governor also does not share the power to make the budget for Executive branch agencies and to veto legislation.<sup>12</sup> In addition, the Governor is in direct charge of state agencies that are not under the supervision of cabinet officers or under the control of the Governor and Cabinet collegially.<sup>13</sup>

### III. THE DEBATE

Should the Florida Cabinet be abolished? People who care about the organization of our state government tend to have strong feelings on this subject. This is also a question that will likely confront the next Constitutional Revision Commission when it convenes in a few years time. That prediction is based on past history. The Cabinet was on the constitutional revision agenda in 1968 and 1978. In the 1968 Constitution, the Cabinet system was strengthened and given a clearer constitutional mandate. In 1978, the Constitutional Revision Commission recommended that the

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8. D'ALEMBERTE, *supra* note 2, at 65.

9. FLA. CONST. art. IV, § 6.

10. *Id.* § 3(b).

11. MORRIS, *supra* note 2, at 12.

12. *Id.*

13. For a good discussion of which agencies are under whose control, see Landers, *supra* note 2, at 1092-93. However, there has been some reorganization of the Executive branch since that article was published, most notably the merger of the Department of Business Regulation to form the Department of Business and Professional Regulation, Ch. 93-220, § 2, 1993 Fla. Laws 1793, and the merger of the Department of Natural Resources and the Department of Environmental Regulation to form the Department of Environmental Protection. Ch. 93-213, 1993 Fla. Laws 2129, 2135-36 (amending FLA. STAT. § 370.017).

Cabinet be abolished, but that recommendation was rejected at the polls.<sup>14</sup> Would the abolition of the Cabinet be a welcome reform, or is the Florida Cabinet a valuable resource that should be better appreciated?

### A. *The Origins of the Cabinet*

The origins of the Cabinet have been traced back to the middle of the last century.<sup>15</sup>

The first mention of Cabinet officers was in the 1868 *Constitution*, but rather than being elected, they were appointed by the Governor and confirmed by the senate. The 1885 *Constitution* eliminated the word "Cabinet," but established six "administrative officers" who were to be elected and who came to be known as the "Cabinet." In subsequent years, the Legislature began vesting these Cabinet officers with additional duties beyond those established in the *Constitution*, and began establishing collective responsibilities. By 1968 the Governor and Cabinet, in various combinations, served on thirty-five different boards and commissions.<sup>16</sup>

The Cabinet system was strengthened in the 1968 Florida Constitution.

The new [1968] constitution not only retains the same six elective Cabinet officials as the old constitution, but actually strengthens their powers by providing a specific constitutional source for statutes creating ex officio boards with the right to appoint officers, hire employees, fix salaries, etc. By contrast to the 1885 Constitution, the Florida Constitution of 1968 nowhere refers to the Cabinet members merely as "administrative officers," expands the legislative empowering clause from "... perform such other duties as may be prescribed by law," to "... exercise such powers and perform such duties as may be prescribed by law," and specifically authorizes laws placing executive departments under the supervision of the Governor and the Cabinet, or [even] under a single Cabinet member.<sup>17</sup>

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14. MANNING J. DAUER, *FLORIDA'S POLITICS & GOVERNMENT* 97 (2d ed. 1986) (70% of the voters rejected the proposal).

15. For a more complete discussion of the origins of the Florida Cabinet, see Ira W. McCollum, Jr., *The Florida Cabinet System—A Critical Analysis*, 43 FLA. B. J. 156, 158-61 (1969) and Landers, *supra* note 2, at 1098-1100.

16. Landers, *supra* note 2, at 1099.

17. McCollum, *supra* note 15, at 166-67.

It is unclear whether the Cabinet will be in or out of favor when the next round of constitutional revision begins.

### B. *The Arguments*

The arguments for and against the cabinet system are not completely unexpected. Those who support the cabinet system are likely to argue the virtue of entrusting the work of the Executive branch to a number of elected, and hence independently accountable, government officials, rather than to the Governor and his or her appointed assistants. As expressed by one former cabinet member:

The bad effects of the governor appointing system, rather than the elected cabinet system, to oversee the executive branch must be considered. Appointive bureaucracy is one of the great problems continuing to mount on the American governmental scene. The power of the ballot of Floridians in electing or rejecting those who seek cabinet positions is the best possible guarantee for sound administration because of the accountability of each cabinet officer to the people whom he is privileged to serve.<sup>18</sup>

At least in theory, elected officials have their credentials and performance tested regularly at the ballot box, and, it is argued, a group of cabinet members chosen in statewide elections could bring to the job a collective wisdom, responsiveness and accountability uncharacteristic of appointed officials.<sup>19</sup> The fact that there has historically been no limit on cabinet members' terms has been advanced as a plus because they are able to accumulate experience and provide continuity beyond that provided by the Governor, who is limited to a maximum of two terms by the constitution.<sup>20</sup> Proponents also note that the cabinet system allows the government to "spread the heat" of controversial decisions.<sup>21</sup>

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18. Dickinson, *supra* note 2, at 339.

19. "One of the chief distinguishing features of the Cabinet is its ability to benefit from the wisdom and experience of seven men instead of one on important, executive decisions. This is the business-like board of directors' approach to sound executive decision making." *Id.* at 338.

20. *Id.* The adoption of a constitutional amendment that places term limitations on Florida officeholders promises to change this dynamic, but there has been very little discussion of the effect of this change to date. See FLA. CONST. art. VI, § 4 (eight year limit).

21. Governor Fuller Warren said that "spreading the heat" may not be the most elegant way to express it, but that this was one of the purposes of the cabinet system. MORRIS, *supra*

Also, the system allows both Democrats and Republicans to participate in the Executive branch at the same time. While this kind of power sharing between political parties is common in the Legislative branch, it is quite uncommon in the Executive branch. This feature is more significant now that the two party system in Florida has become more vital. Although it was once the exclusive domain of Democrats, the Cabinet today includes four Democrats and two Republicans. Whether a multi-party Executive branch is a benefit or a liability has not been the focus of much serious study. It is also unclear how this new dynamic will effect the chances that the Cabinet will be abolished during the constitutional revision. Since neither party's control of the Governor's Office is certain, will both want to leave open the possibility of participating in the Executive branch through the cabinet system? Also, many cabinet members have come to the Cabinet after serving as elected officials in the Legislative branch. Will the Legislature oppose changes to the cabinet system to preserve their members' opportunities to step up to statewide office after service in the Legislature?

In addition, proponents may contend that the cabinet system allows potential candidates for governor or senator to develop and test their statewide electoral support on the way to other statewide offices. Through their decisions on issues before the Cabinet, cabinet members can develop a track record on issues of statewide importance. Although cabinet members have often aspired to other statewide offices in recent years, surprisingly few have successfully used the Cabinet as a springboard to other offices.<sup>22</sup>

Proponents are also likely to point to the openness of cabinet proceedings as a significant virtue of the cabinet system.<sup>23</sup> The proceedings are open to public view and can provide ordinary people with a forum to address the powerful on issues of statewide importance.

Cabinet day—usually a Tuesday—has come to serve as Florida's

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note 2, at 14. One commentator critical of the cabinet system has suggested that it is better characterized as "a way to escape the heat." Landers, *supra* note 2, at 1095.

22. For instance, one commentator has observed:

Since 1960, every Secretary of State except one has run for either Governor, Lieutenant Governor or the United States Senate. Since the mid-sixties every Attorney General has run for either Governor or the United States Senate. In the last decade, the Treasurer has twice run for the United States Senate. Interestingly, these attempts by Cabinet officers for political promotion have almost never succeeded.

Landers, *supra* note 2, at 1100.

23. See, e.g., Dickinson, *supra* note 2, at 339.



“town meeting” with the public’s business transacted with a greater degree of openness than may be found in any other state government.

A meeting on Cabinet day affords the public an opportunity to watch State government in operation. Because the Governor and the six Cabinet officers are peers, each responsible basically to the electorate, differences of opinion usually go unconcealed.<sup>24</sup>

The integration of this “town meeting” role of the cabinet system into the more traditional administrative and judicial process is sometimes awkward,<sup>25</sup> but the goal of providing a forum where politics, policy, and law converge during the decisionmaking process seems worthwhile.

Opponents of the cabinet system are likely to see the fact that the Cabinet is elected as a liability. They are likely to see the dynamics of the cabinet system as encouraging political horsetrading and discouraging principled decisionmaking, since an elected Commissioner of Education or Insurance Commissioner, for example, might be tempted to trade votes on issues that come before the Cabinet that are in areas far removed from their area of primary concern in order to win support in the areas important to them. This dynamic may reduce the validity of the proponents’ accountability argument as well, since the Insurance Commissioner and the Commissioner of Education are unlikely to run on, or be called to task for, their environmental record for example, even though as cabinet members they cast many important votes on the environment. Also, opponents may argue that specialists would be more capable administrators of the agencies than cabinet officers or the Governor and Cabinet as a collegiate body, both because specialists are likely to have more expertise than politicians and because specialists would give their full attention to their one job and not divide their time and attention, as the current system requires elected cabinet officials to do. Proponents are likely to respond both that this analysis undervalues the experience and wisdom of cabinet officials and overvalues appointed officials, who are more likely to be chosen for their political connections than for their expertise as administrators.

In addition, the cabinet system is criticized for dividing the executive power of the state. Critics suggest that if the entire executive power of the state was vested in the Governor, the Executive branch would become more

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24. MORRIS, *supra* note 2, at 17.

25. See, e.g., *Fox v. Treasure Coast Regional Planning Council*, 442 So. 2d 221, 226 (Fla. 1st Dist. Ct. App. 1983) (compromise plan adopted by Cabinet sitting as the Florida Land and Water Adjudicatory Commission after hearing arguments “from parties as well as comment by interested groups and individuals” remanded because not supported by evidence in the record).

accountable.

Who is held responsible for what? The Governor is generally perceived as the head of the executive branch of government although he has less than total authority over that branch. The Governor is always at risk of being blamed for failures caused by elements beyond his control.

On the other hand, the Governor, as well as Cabinet members, may escape accountability for departments they collectively head. Candidates for Cabinet offices run almost exclusively on issues concerning the departments they will head, and that is generally the basis for their election.<sup>26</sup>

Opponents also argue that the cabinet system is inefficient. Not only have the Governor and Cabinet been known to spend great amounts of time on small matters,<sup>27</sup> the Cabinet has developed a staff structure that places yet another layer of bureaucracy over the operation of the departments that must answer to the Governor and Cabinet. Cabinet aides' sessions "have become virtual 'mini' Cabinet meetings that sometimes last longer than actual cabinet meetings" according to one critic.<sup>28</sup>

A collection of lawyers, lobbyists, opponents, and proponents plead their causes at these meetings, which have become a virtual prerequisite to appearing before the Governor and Cabinet the following week. After the aides meet and before the Governor and Cabinet convene, the aides brief their principals and recommend how they should vote.<sup>29</sup>

One summary of the opponents' complaints is that the cabinet system in Florida "results in a weak executive branch, a lack of accountability, poor management, wasted money, and is illogical . . . ."<sup>30</sup> It has been suggested that the various roles of the Governor, Cabinet, and of various cabinet officers could be reorganized to place most of the Executive branch under the control of the Governor, and that some of those changes would require only statutory changes.<sup>31</sup>

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26. Landers, *supra* note 2, at 1094-95.

27. *Id.* at 1096. One oft cited example of this is the hours that were once spent debating the size that green turtles must reach before they could be taken. *Id.*; MORRIS, *supra* note 2, at 15.

28. Landers, *supra* note 2, at 1097.

29. *Id.*

30. *Id.* at 1098.

31. *See id.* at 1100-02.

## IV. CONCLUSION

The debate over the cabinet system in Florida is not a new debate. To the extent that the debate is about the merits of election versus appointment, the benefits of choosing government officials based upon their political strengths versus their substantive expertise, it is an old debate that is now being held in a new context. This debate has a familiar ring to it because it is an argument that has echoed down so many corridors of American government over so many years. This debate is repeated as our government institutions are constantly organized and reorganized to respond to the weaknesses in old systems and to help better prepare government to solve new problems that seem increasingly more complex and intractable. As Professor Bernard Shapiro explains:

From the founding of the republic, Americans have embraced two opposing modes of public administration, the democratic and the technocratic. The former, which we might term the Jacksonian tradition, calls for government by the common people themselves, or at least by administrators directly representative of and responsible to the people . . . . The opposing, Federalist tradition, first advocated by Hamilton, stresses the need for efficient government and thus the need for an administration staffed not by an ever-changing stream of Know-Nothings, but by experts.<sup>32</sup>

The recurring nature of this debate suggests that, while individuals may adopt a position with great conviction, there are no “right” answers to questions like: Which is better, election or appointment? If we are to arrive at some consensus about which system is right for Florida, we must broaden the debate.

More than the narrow arguments about which system makes decision-makers more accountable, or more efficient, are necessary here. We must recognize that even the word “accountability” may mean different things to different people. Both sides in the debate argue their approach as to which makes decisionmaking more accountable: the election of cabinet members or the appointment of department heads by the Governor. One reason behind the debate seems to be that they disagree about what accountability means. What makes someone accountable; their formal accountability through election, or their actual accountability as the system really operates? Cabinet members are directly subject to reelection, but it is rare indeed that

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32. Bernard Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1495-96 (1983).

they are turned out of office, no matter what they have done. Department heads are not elected, but they may either be fired by the Governor, whose reelection is not assured and who is not permitted to stay in office more than eight years, or they may be "fired" by the people themselves when the Governor is rejected at the polls. If accountability means directly subject to reelection, none of these other facts matter.

In discussing efficiency, we must not only argue about which approach is more efficient, we must also consider the importance of efficiency. This should be done both as a philosophical matter, that is, how important is efficiency when balanced against competing interests, and it should be done in context, that is within the totality of circumstances of Florida government. Just because a system is inefficient does not mean it should be abolished. For example, Florida has chosen to adopt an Administrative Procedure Act that is relatively inefficient, when compared with other state administrative procedure acts. This was a choice motivated both by the Legislature's view of the context at the time our state Administrative Procedure Act was adopted, a view that state agencies could not be trusted in their dealings with the public, and their political philosophy, a belief that in the balance between efficiency, accuracy and acceptability, the three normative requirements usually identified in administrative procedure, efficiency was a minor concern. The result was a conscious decision to make the Act less efficient but more protective of individual rights.<sup>33</sup>

To date, much emphasis has been placed on apparent weaknesses of the cabinet system (e.g., that it divides executive power) and on the perceived irrationality of some power sharing choices (e.g., why is one department under a cabinet officer, another under the Cabinet and a third under the Governor?), but that alone will probably not be enough to compel people to change the system. People will want to know how well the cabinet system is serving Floridians. The literature as it exists does not answer this question. A complete answer necessarily requires a more explicit discussion of both political philosophy and the larger context of the debate. Until that discussion occurs, we may have difficulty deciding with confidence what changes, if any, should be made to the cabinet system.

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33. For a more complete discussion of these points see Stephen T. Maher, *The Seventh Administrative Law Conference Chairman's Introduction to the Symposium Issue*, 18 FLA. ST. U. L. REV. 607 (1991); Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767 (1991).

# The Governor's Troops Under the Florida Constitution

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## I. INTRODUCTION

"The militia<sup>1</sup> shall be composed of all ablebodied inhabitants of the state who are or have declared their intention to become citizens of the United States . . . ."<sup>2</sup> This requirement, found in article X, section 2 of the Florida Constitution, imposes a universal military obligation<sup>3</sup> on the inhabitants of the state. The universal military requirement was the basis of the colonial militia system.<sup>4</sup> Members of the militia are citizen-soldiers<sup>5</sup> who fulfill this obligation. They are ordinary citizens who are willing to disrupt their lives for the greater good. The spirit of the militia is alive today in the form of the National Guard.<sup>6</sup>

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1. Militia is defined as "[t]he body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army." BLACK'S LAW DICTIONARY 993 (6th ed. 1990).

2. FLA. CONST. art. X, § 2(a).

3. Universal military obligation is based on the theory that every ablebodied man has a civic duty to defend his society. See JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 6 (Louis Morton ed., 1983).

4. See Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 923 (1988); see also MAHON, *supra* note 3, at 14-18 (describing early militia system).

5. See James B. Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 949-51 (1992).

6. See *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965) (declaring the National Guard as the modern militia).

"The [National] Guard is an essential reserve component of the Armed Forces of the United States"<sup>7</sup> that is used to augment the federal military in times of need.<sup>8</sup> By presidential order,<sup>9</sup> or congressional determination,<sup>10</sup> the National Guard can be called into federal service.<sup>11</sup> This creates a "dual enlistment"<sup>12</sup> . . . whereby an incoming guardsman join[s] both the National Guard of his home state and the National Guard of the United States, a reserve component of the U.S. [military]."<sup>13</sup> Thus, Guardsmen lead their lives subject to calls for service by both their home state and their federal government.<sup>14</sup>

Florida has the oldest militia of any state in the country.<sup>15</sup> Duty, honor, and sacrifice are traditions which permeate every aspect of the Florida Guard.<sup>16</sup> This article examines Florida's military force in regard

7. Gilligan v. Morgan, 413 U.S. 1, 7 (1973); *see also* 10 U.S.C. § 261 (1988) (naming the National Guard as a reserve component of the federal armed forces).

8. 10 U.S.C. § 262 (1988); *see also id.* § 263 (authorizing Congress to augment federal forces).

9. *Id.* § 332.

10. *Id.* § 263.

11. For Florida's contribution to the Seminole Wars, *see generally* George C. Bittle, In the Defense of Florida: The Organized Florida Militia from 1821 to 1920 (1965) (unpublished Ph.D. dissertation, Florida State University). For Florida's contribution to the Mexican War, Civil War, Spanish-American War, World War I, World War II, Korean War, and Vietnam War, *see generally* ROBERT HAWK, FLORIDA'S ARMY (1986) (detailing that the Florida militia has been called to federal duty in every major war since gaining statehood in 1845). For Florida's contribution to the Persian Gulf War, *see generally* FLA. ADJUTANT GEN. ANN. REP. 28 (1992) [hereinafter ADJUTANT REPORT].

12. The dual enlistment concept is embodied in the enlistment oath taken by a Guardsman. *See* 32 U.S.C. § 304 (1988). In Florida, the Guardsman swears to "support and defend the Constitution of the United States and of the State of [Florida] against all enemies . . . and . . . obey the orders of the President of the United States and the Governor of [Florida] . . . ." *Id.*

13. Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969).

14. Perpich v. Department of Defense, 496 U.S. 334, 348 (1990). Justice Stevens, describing the role of Guardsmen, wrote, "[i]n a sense, all of them now must keep three hats in their closets - a civilian hat, a state militia hat, and an army hat - only one of which is worn at any particular time." *Id.*

15. HAWK, *supra* note 11, at 16. Florida's militia tradition began on September 16, 1565, when Spanish Admiral Pedro Menendez de Aviles left the settlement of St. Augustine with his troops and designated the civilian left behind to defend the settlement as "milicia". *Id.*

16. Throughout this article, the terms Florida Guard, Florida National Guard, Florida Air Guard, and organized militia will be used interchangeably. These terms refer to those citizens who volunteer to serve in the state's military force, as opposed to the entire Florida population comprising the militia. In addition, for the sake of consistency, fluidity, and

to its state militia status.

## II. CONSTITUTIONAL AND STATUTORY AUTHORITY

### A. *Composition of State Military Force*

The state constitutional authority for the composition of the militia is found in article X, section 2 of the Florida Constitution.<sup>17</sup> Although the constitution imposes a universal military obligation,<sup>18</sup> the militia is statutorily divided into an organized and an unorganized component.<sup>19</sup> The organized militia consists of the National Guard.<sup>20</sup> The unorganized militia consists of the entire ablebodied population who are, or intend to become, Florida citizens.<sup>21</sup>

Superficially, a universal military obligation seems antiquated. However, it is by precisely this authority that the Governor can institute a draft of ablebodied citizens into the state organized militia, thereby compelling military service to the state. "The Governor shall have the power . . . to order into active service of the state all or any part of the militia that he may deem proper."<sup>22</sup> Although the Governor's power to draft Florida citizens into the organized militia appears diminished by related

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simplicity within the article, all references to the Governor will be in the masculine.

17. FLA. CONST. art. X, § 2. Article X, section 2 reads in full:

(a) The militia shall be composed of all ablebodied inhabitants of the state who are or have declared their intention to become citizens of the United States; and no person because of religious creed or opinion shall be exempted from military duty except upon conditions provided by law.

(b) The organizing, equipping, housing, maintaining, and disciplining of the militia, and the safekeeping of public arms may be provided for by law.

(c) The governor shall appoint all commissioned officers of the militia, including an adjutant general who shall be chief of staff. The appointment of all general officers shall be subject to confirmation by the senate.

(d) The qualifications of personnel and officers of the federally recognized national guard, including the adjutant general, and the grounds and proceedings for their discipline and removal shall conform to the appropriate United States army or air force regulations and usages.

*Id.*

18. *See supra* note 3.

19. FLA. STAT. § 250.02 (1991).

20. *Id.* § 250.02(2).

21. *Id.* § 250.02(3).

22. *Id.* § 250.06(3).

legislation,<sup>23</sup> it remains the state statutory law.

In 1917, Governor Catts sought an advisory opinion to determine his authority to draft county guards into state military service.<sup>24</sup> The Florida Supreme Court interpreted sections 1<sup>25</sup> and 4<sup>26</sup> of article 14 of the 1885 Florida Constitution. The supreme court informed the Governor that all inhabitants of the state who fit the constitutional definition were a part of the state militia, and subject to the Governor's orders for purposes of preserving the public peace, executing the laws of the state, and suppressing insurrection.<sup>27</sup> By informing the Governor of his authority, the Florida Supreme Court validated a constitutional limitation on the Governor's authority to draft civilians into state service.<sup>28</sup> By constitutional mandate, his authority to compel civilians into military service is strictly limited to the express purposes of preserving public peace, executing laws, suppressing insurrection, or repelling invasion.<sup>29</sup>

### B. *Authority for Command and Control*

Although the Governor is commander-in-chief of all the state militia,<sup>30</sup> his power is greatest as commander-in-chief of the organized militia. To

23. See FLA. STAT. § 251.01(1) (Supp. 1992). In authorizing the Governor to organize and maintain military forces to assist civil authorities in the event the Florida National Guard is activated into federal service, the Governor is directed to take volunteers and supplement the Florida Guard through the drafting of militiamen *already enrolled* in the Florida National Guard. *Id.* This represents a change from the previous provision which authorized the Governor to supplement the Florida National Guard, in the event the Guard is activated into federal service, through members of the *entire* state militia. See also FLA. STAT. § 252.36(4) (1991) (during a state of emergency, the Governor is commander-in-chief of the organized militia and the *volunteer* militia).

24. *In re Advisory Opinion to Governor*, 77 So. 87 (Fla. 1917).

25. Article XIV, section 1 of the 1885 Florida Constitution defines militia as all ablebodied male inhabitants between the ages of 18 and 45. FLA. CONST. of 1885, art. XIV, § 1.

26. Article XIV, section 4 of the 1885 Florida Constitution provides the Governor with the power to call out the militia to preserve public peace, execute the laws of the state, suppress insurrection, or repel invasion. *Id.* § 4. It is the substantive equivalent of the current constitutional provision.

27. *Advisory Opinion*, 77 So. at 88.

28. See *id.*

29. See *id.*

30. FLA. CONST. art. IV, § 1(a) (providing that "[t]he supreme executive power shall be vested in a governor," and "[h]e shall be commander-in-chief of all military forces of the state not in active service of the United States"); see also FLA. STAT. § 250.06(1) (1991) (declaring the Governor the commander-in-chief of all state militia).



achieve the constitutional mandate of ensuring that the laws are faithfully executed,<sup>31</sup> the Governor is authorized to use the state military force.<sup>32</sup> In cases of civil unrest, the Governor may use the state military force to preserve public peace.<sup>33</sup> When the Governor declares a state of emergency, he may use the military to enforce any rules or regulations promulgated in reaction to that emergency.<sup>34</sup> The Governor is further authorized to use the military force to intervene in any situation where there exists violence, threats of violence, or any disturbance which threatens the peace and good order of society.<sup>35</sup> Furthermore, the Governor is authorized to deploy the military forces to assist and aid those civil authorities which are unable to suppress any of the following situations: invasion, insurrection, riot, mob, unlawful assembly, breach of the peace, or resistance to the execution of laws.<sup>36</sup>

The United States Supreme Court has long recognized that maintaining law and order is the most important state interest,<sup>37</sup> and the range of discretion within which a Governor acts pursuant to this interest must be broad.<sup>38</sup> When a Governor determines that an emergency requires the aid of the military, his decision to deploy troops is conclusive.<sup>39</sup> Although the power to deploy the state military is broad, Florida governors have historically used great discretion in calling out this body. No reported court decision has ever challenged the use of this gubernatorial power by a Florida governor.

In addition to his authority to deploy the military force, the Governor has other duties as commander-in-chief. The Governor has the power to authorize the Florida Guard's participation in any parades, reviews, or public exercises.<sup>40</sup> He is responsible for ensuring that the Florida Guard conforms

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31. FLA. CONST. art. IV, § 1(a).

32. *Id.* § 1(d).

33. FLA. STAT. § 14.02 (1991).

34. *Id.* § 14.021(3).

35. *Id.* § 14.022(1).

36. *Id.* § 250.28.

37. *Sterling v. Constantin*, 287 U.S. 378, 399 (1932).

38. *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974).

39. *See Sterling*, 287 U.S. at 399. "That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and . . . use the milder measure of seizing the bodies of those [who] . . . stand in the way of restoring peace." *Moyer v. Peabody*, 212 U.S. 78, 84 (1909). But every action the Governor takes is not conclusive, because "the allowable limits of military discretion . . . are judicial questions." *Sterling*, 287 U.S. at 401.

40. FLA. STAT. § 250.06(4) (1991).

to the terms of federal legislation.<sup>41</sup> He also appoints all General officers, including the Adjutant General.<sup>42</sup> However, these appointments must be confirmed by the Senate.<sup>43</sup> The Governor is also responsible for convening all General court martials,<sup>44</sup> approving dishonorable discharges,<sup>45</sup> approving pay vouchers,<sup>46</sup> and borrowing funds to pay Guardsmen activated in service of the state.<sup>47</sup>

Although the Governor is commander-in-chief, the Adjutant General is vested with direct operational control of the militia.<sup>48</sup> The state headquarters is under the administration of the Adjutant General,<sup>49</sup> who is Chief of the Department of Military Affairs.<sup>50</sup> The Adjutant General is charged with supervising all aspects of the troops, arms, and equipment, maintaining official records, and preparing all reports and returns required by the Secretary of Defense.<sup>51</sup>

The Adjutant General is vested with the exclusive authority of appointing an Assistant Adjutant General and a State Quartermaster.<sup>52</sup> Through the State Quartermaster, the Adjutant General is accountable for all funds disbursed and received through the Department of Military Affairs.<sup>53</sup> Similarly, the Adjutant General has the exclusive authority of allocating appropriations to the armories<sup>54</sup> located throughout the state.<sup>55</sup> Furthermore, the Adjutant General is authorized to activate the Florida Guard if the Governor cannot be reached and an emergency exists of which time is of the

41. *Id.* § 250.08.

42. *See id.* § 250.13.

43. *Id.*

44. *Id.* § 250.35.

45. FLA. STAT. § 250.35 (1991).

46. *Id.* § 250.24.

47. *Id.* § 250.25.

48. *See id.* §§ 250.10-250.28.

49. *Id.* § 250.07.

50. FLA. STAT. § 250.10 (1991); *see also id.* § 250.05 (the Department of Military Affairs is an agency of the state government which includes every member of the Florida National Guard and all employees required to wear a military uniform in performance of their official duties); *State v. Florida State Improvement Comm'n*, 47 So. 2d 627 (Fla. 1950) (holding that the Florida National Guard is an arm of state government).

51. FLA. STAT. § 250.10 (1991).

52. *Id.*

53. *Id.*

54. An armory is a building used primarily for housing and training of troops and the storing of arms and other military property. *Id.* § 250.41. For further discussion of armories, see *infra* notes 107-10 and accompanying text.

55. FLA. STAT. § 250.20 (1991); *see generally id.* § 250.41.

essence.<sup>56</sup>

The statutory scheme delegating duties to the Governor and Adjutant General leads to the conclusion that their respective powers are expressed. The Governor is commander-in-chief, but is only permitted to call out the Guard in certain situations.<sup>57</sup> Other duties are dictated to the Governor by statute as well.<sup>58</sup> Similarly, the Adjutant General has been vested with exclusive powers with which to run the Florida National Guard.<sup>59</sup>

Since these powers are statutorily granted, the Governor cannot take direct operational control of the Florida Guard pursuant to any implied powers as commander-in-chief.<sup>60</sup> When troops are called out in an emergency, the civil authorities outline the objectives to be accomplished by the military force.<sup>61</sup> However, only active militia officers may give tactical directions to the military forces on how to achieve those objectives.<sup>62</sup> In addition, courts have held that when a Governor calls out the state militia pursuant to the constitutional mandate to faithfully execute the laws, he is acting in his civil capacity and not as a military commander-in-chief.<sup>63</sup>

56. *Id.* § 250.28.

57. *See supra* text accompanying notes 31-36.

58. *See supra* text accompanying notes 40-47.

59. *See supra* text accompanying notes 49-56.

60. *See Farmer v. Mabus*, 757 F. Supp. 1462 (S.D. Miss. 1991). When the Governor of Mississippi attempted to assume performance of the Adjutant General's duties on the theory of implied powers of the commander-in-chief to direct and control operations of Mississippi National Guard, the Mississippi Supreme Court held that the Legislature had clearly established that certain powers are to be exercised by the commander-in-chief and certain powers are to be exercised by the Adjutant General. *Id.* Any theory of implied powers would be contrary to the statutory scheme. *Id.*; *see also State v. Hansen*, 401 P.2d 954 (Wyo. 1965) (where Wyoming Supreme Court held that the Governor exceeded his power in removing the Adjutant General pursuant to implied powers as commander-in-chief, and not pursuant to statutory scheme).

61. *See* FLA. STAT. § 250.30 (1991).

62. *See id.* The statute reads in part:

When an armed force is called out in aid of the civil authorities, the orders of the civil officer or officers may extend to a direction of the general or specific objects to be accomplished and the duration of service by the active militia, but the tactical direction of the troops, the kind and extent of force to be used, and the particular means to be employed to accomplish the objects specified by the civil officers, are left solely to the officer of the active militia.

*Id.*

63. *Constantin v. Smith*, 57 F.2d 227 (E.D. Tex. 1932), *aff'd sub nom. Sterling v. Constantin*, 287 U.S. 378 (1932); *see also In re Moyer*, 85 P. 190 (Colo. 1904), *aff'd sub nom. Moyer v. Peabody*, 212 U.S. 78 (1909); *Franks v. Smith*, 134 S.W. 484 (Ky. Ct. App. 1911); *State v. McPhail*, 180 So. 387 (Miss. 1938). The Florida Constitution embraces this

Thus, unless the Governor is also an active militia officer with command authority, he is prevented by law from exercising tactical operational command.

Members of the Florida Guard are not criminally or civilly liable for any lawful act done by them in good faith and within the scope of their duties.<sup>64</sup> If injured while on active state duty, they are provided medical treatment at the state's expense.<sup>65</sup> More importantly to the troops, no private or public employer can terminate, reprimand, or penalize a Guardsman because of an absence due to state active duty.<sup>66</sup> Since these Guardsmen are primarily citizens, the security of their employment is extremely important in maintaining an effective militia.

### III. MILITARY MANAGEMENT

#### A. *Strength and Firepower*

Since the National Guard is an integral part of the first line defense of the United States,<sup>67</sup> the composition of its units<sup>68</sup> and its training<sup>69</sup> conforms to that of the federal military. In addition, the National Guard uses the same type of arms and equipment as the federal military.<sup>70</sup> There are nearly 14,000 federally trained and equipped Guardsmen employed by the Department of Military Affairs.<sup>71</sup> Since the Department of Military Affairs is a part of the National Guard of the United States, the Governor is

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view by mandating that "[t]he military power shall be subordinate to the civil." FLA. CONST. art. I, § 7. Consequently, the troops called out to enforce the laws "act as civil officers, with no greater power than civil officers would have." *Constantin*, 57 F.2d at 241. The military is sent to perform the duties which the local executives would and could perform were they able. *McPhail*, 180 So. at 391. In essence, when the Governor calls out the troops to execute the laws, the troops are police officers whose purpose is to preserve the peace and tranquility of the state. See *Franks*, 134 S.W. at 493.

64. FLA. STAT. § 250.31 (1991).

65. *Id.* § 250.34.

66. *Id.* § 250.482.

67. 32 U.S.C. § 102 (1959).

68. *Id.* § 104.

69. *Id.* § 501.

70. *Id.* § 701.

71. ECON. IMPACT REP. OF THE FLA. NAT'L GUARD (Fla. Dep't of Military Aff., Tallahassee, Fla.) 6 (1993) [hereinafter IMPACT REPORT]. The exact figure at the end of Fiscal Year 1992 was 13,852. *Id.* This figure fluctuates due to retirement, discharge and new enlistments.

commander-in-chief of a military force that could rival that of a third world country.

The Governor's troops are divided into the Florida Army National Guard and the Florida Air National Guard.<sup>72</sup> The Adjutant General is Commanding General for both divisions.<sup>73</sup> The Florida Army National Guard has seven major commands consisting of 12,168 troops.<sup>74</sup> These seven commands include: the 227TH Field Artillery Brigade, the 53RD Infantry Brigade, the 419TH Aviation Group, the Troop Command, the 53RD Signal Brigade, the 164TH Air Defense Artillery Brigade, and the Camp Blanding Training Site.<sup>75</sup> As this article will demonstrate, these seven commands provide the Governor with an army capable of accomplishing any domestic mission, and most combat missions.

The 227TH Field Artillery Brigade provides command and control of two field artillery battalions, and one direct support maintenance company.<sup>76</sup> The 53RD Infantry Brigade is comprised of three infantry battalions that are specifically trained to provide public safety during civil emergencies.<sup>77</sup> The 419TH Aviation Group consists of a unit which operates both the AH-64 Apache attack helicopters and the UH-60 Blackhawk utility helicopters.<sup>78</sup> In addition, the 419TH operates an air ambulance.<sup>79</sup> When activated by the Governor, the 419TH provides command and control to aviation units within Florida.<sup>80</sup> The Troop Command is the most diverse command in the Florida Guard.<sup>81</sup> It operates a medical group, a mobile surgical hospital, a special forces battalion, and a military intelligence battalion.<sup>82</sup> The Troop Command is trained to assume command and control of land defense units, and to provide military support to civil authorities at the direction of the Governor.<sup>83</sup> The 53RD Signal Brigade is made up of two signal battalions which operate two signal companies, two transportation companies, and one maintenance company.<sup>84</sup> In addition to

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72. ADJUTANT REPORT, *supra* note 11, at 5.

73. *Id.*

74. *Id.*

75. *Id.* at 38-50.

76. *Id.* at 45.

77. ADJUTANT REPORT, *supra* note 11, at 40.

78. *Id.* at 47.

79. *Id.*

80. *Id.* at 46.

81. *Id.* at 38.

82. ADJUTANT REPORT, *supra* note 11, at 38.

83. *Id.*

84. *Id.* at 44.

providing support to civil authorities, they have the capability of installing and operating a communications network for command and control during an emergency.<sup>85</sup> The 164TH Air Defense Artillery Brigade is capable of providing air defense through the use of the Chaparral Missile System, which is a heat seeking air defense artillery weapon.<sup>86</sup>

The Florida Army's capabilities are enhanced by the Florida Air Guard. The Florida Air Guard consists of one major fighter group,<sup>87</sup> and three major squadrons<sup>88</sup> comprising 1615 Guardsmen.<sup>89</sup> The 125TH Fighter Group consists of a fighter interceptor group and support squadrons.<sup>90</sup> It also operates a medical clinic.<sup>91</sup> The 202D Red Horse Civil Engineering Squadron is capable of providing heavy damage repair to aircraft launch facilities due to enemy attack or natural disaster.<sup>92</sup> The remaining two major squadrons have capabilities in satellite communications,<sup>93</sup> and high frequency communications support.<sup>94</sup>

Due to the size and capabilities of the state's military force, it is highly unlikely that the Governor would ever consider drafting civilians into state service. The Florida Guard has both the firepower and the training necessary to enable the Governor to achieve his constitutional mandates. Whatever situation develops requiring military force, the Governor may be certain that a competent, well equipped militia is ready to answer the call.

### B. *Financing the Force*

In addition to providing the state with the security of an armed force of citizen-soldiers, the Florida Guard generates federal funds and state revenue. Since the National Guard is a reserve component of the federal military, the federal government provides funding for the Florida Guard.<sup>95</sup> When the Governor calls the Florida Guard to active state service, the State

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85. *Id.*

86. *Id.* at 43.

87. ADJUTANT REPORT, *supra* note 11, at 73.

88. *Id.*

89. *Id.* at 5.

90. *Id.* at 54-64.

91. *Id.* at 58.

92. ADJUTANT REPORT, *supra* note 11, at 64.

93. *Id.* at 67.

94. *Id.* at 65.

95. See 32 U.S.C. § 106 (1988) (providing annual appropriations for the National Guard).

of Florida funds the Florida Guard.<sup>96</sup> Guardsmen on active state duty receive the same pay and allowance as received by the federal military.<sup>97</sup>

At the end of Fiscal Year 1992, the federal government expended \$127,550,329 on the Florida Guard.<sup>98</sup> Additionally, the state appropriated \$13,196,577 for a combined investment of \$140,746,906.<sup>99</sup> Furthermore, the value of army equipment on hand in the state totals nearly \$700,000,-000.<sup>100</sup>

The Guard also receives support from local governments.<sup>101</sup> Since the Florida Guard is based throughout the state, counties and municipalities are authorized to donate financial and material support to the Guard.<sup>102</sup> The value of assistance received from local governments at the end of Fiscal Year 1992 was \$83,435.<sup>103</sup>

### C. Community Involvement

Although the headquarters is located in St. Augustine, the Guard is based throughout the state.<sup>104</sup> The Department of Military Affairs maintains 858 buildings on 121,307 acres of land.<sup>105</sup> There are seventy-one armories located in forty-three counties.<sup>106</sup>

Most Guardsmen assemble one weekend a month at these armories. The armories are primarily used for training<sup>107</sup> and equipment storage, but

96. See FLA. STAT. § 250.24 (1991) (providing for pay and expenses of Guardsmen activated to state duty from state appropriations for preserving public peace); see also *id.* § 250.25 (authorizing the Governor to borrow funds to pay active state Guardsmen if funds are not available).

97. *Id.* § 250.23. In addition, enlisted soldiers receive a \$20 per day bonus for every day served on state active duty. *Id.*

98. IMPACT REPORT, *supra* note 71, at 4; see also ADJUTANT REPORT, *supra* note 11, at 6.

99. IMPACT REPORT, *supra* note 71, at 4. Assuming a money multiplier effect of three percent, the combined economic impact of this investment totals \$423,000,000. *Id.*

100. ADJUTANT REPORT, *supra* note 11, at 6.

101. This support is in the form of cash, utility services and real property donations. See *id.* at 83.

102. See FLA. STAT. § 250.40 (1991). Since national defense is a joint responsibility of all political subdivisions of the country, it is considered equitable that the burden be shared. *Id.*

103. ADJUTANT REPORT, *supra* note 11, at 83.

104. IMPACT REPORT, *supra* note 71, at 3.

105. ADJUTANT REPORT, *supra* note 11, at 36.

106. IMPACT REPORT, *supra* note 71, at 2.

107. See generally 32 U.S.C. § 502 (1988). Members of the National Guard must assemble for drill and instruction 48 times per year. *Id.* In addition, they must participate

they are also available to the community for social activities and emergency shelters.<sup>108</sup> The armories are part of the community. When the armory loses a unit due to military downsizing, the communities grieve.<sup>109</sup> The communities suffer the loss of both economics<sup>110</sup> and patronage. The Guard is the epitome of community benevolence.

The Florida Guard has implemented a statewide Drug Demand Reduction program where Guardsmen enter school classrooms across the state to educate the students on the danger of drugs.<sup>111</sup> The Florida Guard is active in school career days, March of Dimes Walk-A-Thons, and parades throughout the state.<sup>112</sup> Individual Guardsmen volunteer their time to work with youth groups such as scouting and little league, the American Cancer Society, church organizations, and various other community activities.<sup>113</sup>

The Florida Guard also has an extensive family support network in place to assist families during times of mobilization.<sup>114</sup> This network conducts family support workshops for volunteers around the state, and administers an emergency relief fund.<sup>115</sup> Family support groups help alleviate the strain caused when Guardsmen are activated for extended periods of time. When the activation of the Guard is unexpected and the family has no time to prepare, there is an intense strain on the family. As this article will further indicate, this family support network was tested to the limits during the second half of 1992.<sup>116</sup>

#### D. *The Guard in Action*

On August 23, 1992, the Governor ordered the Adjutant General to call out the Florida Guard in response to Hurricane Andrew.<sup>117</sup> The Florida

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in training encampments at least 15 days each year. *Id.* This training requirement translates into a requirement of one weekend a month, and two weeks a year.

108. IMPACT REPORT, *supra* note 71, at 6.

109. See Michael Day, *Build Down Can be Traumatic Experience*, FLA. GUARDSMAN, 3 (1993).

110. Since the armories are community based, Guardsmen boost the local economy through spending and consumption during training weekends.

111. IMPACT REPORT, *supra* note 71, at 6.

112. ADJUTANT REPORT, *supra* note 11, at 14.

113. *Id.* at 42-45.

114. *Id.* at 20-21.

115. *Id.*

116. See John Daigle, Jr., *Guard Families Weather Tough Year*, FLA. GUARDSMAN, 5 (1993).

117. EXEC. ORDER NO. 92-220-E.



Guard was positioned in Dade County even before the storm hit on August 24, 1992.<sup>118</sup> This turned out to be the longest and largest state activation in the history of the Florida Guard.<sup>119</sup>

After the storm hit, the Guard carried out its mission of assisting civil authorities in a variety of ways. Infantry units patrolled streets, engineering units cleared debris, and signal units worked to restore communications.<sup>120</sup> Aviation units flew in supplies, medics treated the wounded, and Guardsmen served food and water to victims.<sup>121</sup> They helped find lost pets, and even drove buses of children to and from school.<sup>122</sup> Although the Guard could not replace the belongings or rebuild the lives of the victims devastated by Hurricane Andrew, the Guard's relief effort, by neighbor helping neighbor and Floridian helping Floridian, may have brought a temporary reprieve into the desperation of the victims.

On November 6, 1992, while the South Florida relief effort was ongoing, the Governor ordered the Adjutant General to call out the Guard for a mission in North Florida.<sup>123</sup> One hundred eighty Guardsmen were activated for thirty days to patrol a ten mile stretch of highway<sup>124</sup> where repeated incidents of rock and brick throwing, as well as sniper fire, resulted in several injuries and one fatality.<sup>125</sup> The Guardsmen set up a communications system, and provided a show of force by the patrols.<sup>126</sup> The Guardsmen security mission resulted in success, as the attacks subsided, and

118. IMPACT REPORT, *supra* note 71, at 5.

119. *Id.* At the peak of the activation, 58 units comprising over 6300 Guardsmen were on duty. *Id.* The last Guardsman to leave active duty returned home on December 18, 1992. *Id.* The Guard provided service for over 3 1/2 months. *Id.* In contrast, less than 1600 Guardsmen were called to federal duty for the Persian Gulf War. IMPACT REPORT, *supra* note 71, at 5. In addition, President Bush sent 20,000 federal troops to Dade County to assist in the relief effort. *Id.*

120. See C.J. Drake, *Stormy Scenes Litter Andrew's Path*, FLA. GUARDSMAN, 22, 23 (1993).

121. *Id.*

122. *Id.*; see also IMPACT REPORT, *supra* note 71, at 5. In addition, the Guard hauled 13,834 cubic yards of debris and cleared 1818 miles of road. *Id.* They distributed 61,990 pounds of food, 290,000 pounds of ice, and 248,000 gallons of water. *Id.* A total of 10,974 civilians were treated by medics and 3106 immunizations were given. *Id.* The Guard provided 54 civilians with dental care and even delivered 13 babies. *Id.*

123. EXEC. ORDER NO. 92-317.

124. John Daigle Jr., *Guarding I-295: Operation Overpass*, FLA. GUARDSMAN, 12 (1993).

125. EXEC. ORDER NO. 92-317.

126. Kaye Jewell, *146TH Signal Battalion Patrolled Hometown Highway*, FLA. GUARDSMAN, 12, 13 (1993).

several suspects were arrested.<sup>127</sup>

Providing relief from natural disasters and assisting law enforcement are common uses of the Guard.<sup>128</sup> However, history reveals some uncommon uses. Prior to the Civil War, the Florida militia was primarily devoted to fighting Seminole Indians,<sup>129</sup> and conducting slave patrols.<sup>130</sup> After the Civil War, the militia was activated over twenty times in a fifty year period to protect African-American prisoners from lynch mobs.<sup>131</sup>

On May 4, 1901, the Florida militia was deployed to Jacksonville pursuant to a declaration of martial law<sup>132</sup> in response to a fire that leveled their city.<sup>133</sup> The presence of the Guardsmen, as well as other federal

127. Daigle, *supra* note 124.

128. See IMPACT REPORT, *supra* note 71, at 8. In the last 15 years, there have been four times where the state has called to active duty 1000 or more troops, excluding Hurricane Andrew. These events were Hurricane Elena in 1985 (2561 troops), Miami/Liberty City riots in 1980 (3979 troops), South Florida Cuban refugee support in 1980 (1414 troops) and the South Florida fuel crisis in 1979 (1100 troops). *Id.*

129. Bittle, *supra* note 11, at 57-89.

130. HAWK, *supra* note 11, at 74.

131. Bittle, *supra* note 11, at 342, 378, 400, 430. The Guard was unsuccessful only once. *Id.* at 401. In June of 1916, an African-American prisoner was murdered in Inverness because the train from Brooksville transporting the troops did not depart in time. *Id.* Consequently, the Guard did not arrive until after the murder. *Id.*

132. Martial law is defined as the "law of military necessity, where the military exercises great control over civilians and civilian affairs, usually because of the existence of war." BARRON'S LAW DICTIONARY 293 (3d ed. 1991). But the definition of martial law has never been clear. See Duncan v. Kahanamoku, 327 U.S. 304, 315 (1946). "[T]he term 'martial law' carries no precise meaning. The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times." *Id.*; see also Note, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560, 1566 n.28 (1968). The confusion regarding the definition of martial law results from the term being used to describe a broad spectrum of measures, ranging from total military control over all civilian functions to the imposition of minor restrictions on personal liberty. *Id.* The confusion is heightened because the Governor is both the chief executive and the military commander-in-chief, thereby blurring the traditional separation of civil and martial law. *Id.*

The concept of martial law is beyond the scope of this article. However, it must be noted that the potential for a Governor to use a military force against the state citizenry has historically been greatest under a declaration of martial law. For cases construing the concept of martial law, see Duncan v. Kahanamoku, 327 U.S. 304 (1946); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Constantin v. Smith, 57 F.2d 227 (E.D. Tex. 1932); Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959); Cox v. McNutt, 12 F. Supp. 355 (S.D. Ind. 1935); Commonwealth *ex rel.* Wadsworth v. Shortall, 55 A. 952 (Pa. 1903).

133. 2 GENE M. BURNETT, FLORIDA'S PAST 213-16 (1988). The fire began around noon on Friday, and by 8:00 p.m., the city of Jacksonville "lay in rubble and ashes, all but

troops, provided stability to more than 10,000 homeless persons, and prevented looters from plundering the remains of the city.<sup>134</sup> The show of force ensured the framework in which the displaced but dedicated Jacksonville residents could begin the task of rebuilding.<sup>135</sup> In April of 1929, the Guard was activated to help quarantine the Mediterranean Fruit Fly discovered in Central Florida orange groves.<sup>136</sup> In 1960, the Guard helped dispose of thousands of dead chickens which posed a health threat to the town of Massayariktown.<sup>137</sup>

In 1980, the Guard was activated to assist the quelling of the Liberty City Riots in Miami.<sup>138</sup> Governor Graham sent the Guard to Miami under orders that they be deployed only around the perimeter of the riot area to avoid unnecessary loss of life due to armed confrontation.<sup>139</sup> The Governor required the Guardsmen to be accompanied by police officers, and the Guardsmen were not authorized to arrest civilians.<sup>140</sup> The Governor's prudent use of the Guard avoided a possible bloodbath, and "ensured the eventual end of the riot by smothering it with sheer numbers."<sup>141</sup> In addition to providing relief efforts to areas destroyed by hurricanes, floods and tornadoes, the Guard has hunted convicts, searched for missing persons, controlled traffic, cleaned up toxic chemical spills and assisted in labor disputes.<sup>142</sup> No matter what the mission, the Florida Guard has always answered the call.

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obliterated from the earth's face by a great conflagration that swept over its streets with freakish fury in one of the greatest calamities ever to befall a Southern city." *Id.* at 213. The fire produced so much smoke that "[i]n Savannah, Georgia, 160 miles north, people flooded the weather office with calls when they mistook the huge pillars of black clouds far southward for a great storm brewing." *Id.* at 215; *see generally* Bittle, *supra* note 11 (referring to the Guard's deployment to Jacksonville pursuant to a declaration of martial law).

134. BURNETT, *supra* note 133, at 215.

135. Indeed, the effort to rebuild began quickly, as "[t]he first building permit was issued that first Monday morning, and . . . [t]he sawmills in the surrounding county . . . could not turn out lumber fast enough." *Id.* at 216.

136. HAWK, *supra* note 11, at 157. Every car, bus and train entering or leaving the area was stopped and searched. *Id.* Nearly 20,000,000 inspections revealed 20,000 contaminated pieces of fruit. *Id.*

137. *Id.* at 201.

138. *See* BRUCE PORTER & MARVIN DUNN, THE MIAMI RIOT OF 1980 93-97 (1984).

139. *Id.* at 95-96.

140. *Id.* at 96.

141. *Id.*

142. HAWK, *supra* note 11, at 198, 201-02.

## IV. CONCLUSION

The militia provided for by article X, section 2 of the Florida Constitution defines every state citizen as a soldier. The true brand of citizen-soldier today is a member of the Florida National Guard. The Florida Guard is a well trained, well equipped, professional military force which is an essential agency of the state government. When the state needs the Guardsmen, they interrupt their civilian employment, leave their spouses, children and parents, and come to the aid and assistance of their fellow state citizens.

Florida has never witnessed its militia used in an abusive manner which restricts liberty, or is repugnant to the very foundation of government. Florida governors have historically used the military in a conservative manner as a means to achieve humanitarian objectives. In addition, the Florida Legislature has framed the laws in such a way as to ensure that actions taken under military orders are pursuant to the civil law, and in the interests of the Florida citizenry. This being the case, the Florida Guard stands ready to act in their fellow citizens' time of peril, and the state citizenry is deeply indebted to this institution's humanitarian contributions to the well-being of the state.

*Anthony J. Scaletta*

## PART IV

### THE JUDICIARY

*If the Constitution may be thought of as the bedrock of our government, than the Florida judiciary can be thought of as the guardians of our democracy. In the fourth part of our Symposium, we examine the work of the Florida courts.*

*In our lead piece, Florida Supreme Court Justice Gerald Kogan and Florida Supreme Court Law Clerk Robert Craig Waters provide a comprehensive roadmap to the operation and jurisdiction of the Florida Supreme Court. Next, District Judge Harry Lee Anstead looks at the role that the Florida Constitution plays in appellate decisionmaking. Finally, Circuit Judge John E. Fennelly examines the constitutional certiorari jurisdiction of Florida's circuit courts.*

*Having looked at the different levels of the court system, our remaining two pieces examine the work of the courts from a different angle. In a piece most of our readers are likely to find personally-meaningful, Thomas A. Pobjecky explains how the Florida Board of Bar Examiners helps the Florida Supreme Court fulfill its constitutional mandate to permit only qualified individuals to become lawyers. Professors Brian E. Mattis and B. Taylor Mattis then explore the judicial doctrine of stare decisis and explain why the time has come to elevate the doctrine to constitutional dignity.*

# The Operation and Jurisdiction of the Florida Supreme Court\*

Gerald Kogan\*\*  
Robert Craig Waters\*\*\*

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\*\* Justice, Supreme Court of Florida, 1987 to present; J.D., University of Miami, 1955; B.A., University of Miami, 1955.

\*\*\* Law Clerk, Supreme Court of Florida, 1987 to present; J.D., University of Florida, 1986; A.B., Brown University, 1979.

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## I. INTRODUCTION

The judiciary is Florida's most poorly understood branch of government. A lack of general public knowledge about the Courts' routine operation is nearly demanded by the institution itself. Judges and their



employees, unlike legislative or executive officials, cannot talk publicly about matters pending before them. Official silence is imposed not merely by constitutional constraints, but also by codes of ethics and the requirement that judges receive information on a case only through the closely regulated process of briefing, motions, and adversarial argument.<sup>1</sup> The information going out of the courthouse is so severely restricted that most Floridians have only a dim understanding of how the judiciary works.

The same conclusion applies with greater force to the Florida Supreme Court. The seven justices and their staffs perform virtually all of their official duties away from public view, behind the security barriers on the second floor of the Supreme Court Building in Tallahassee.<sup>2</sup> What is publicly known of the Court consists largely of its more ceremonial aspects: black-robed justices seated at the Court bench, listening to arguments by lawyers often talking in legal jargon unchanged since medieval times. Officially, the Court speaks only through its formal opinions and orders, all funneled through the Clerk's Office, which appear with little warning.

Part of the purpose of this article is to dispel some of the mystery and lift some of the misconceptions about the Florida Supreme Court's daily operations, including the exercise of its jurisdiction. Only a few prior sources illuminate the topic addressed here, and none of these have attempted a more-or-less comprehensive study. This paper is intended to fill this gap by compiling information useful both to lawyers and to laypersons interested in how the Court operates within its constitutional constraints.

On another level, this article will review the top level of a judicial system that has come into existence in Florida because of the various constitutional reforms that began with the adoption of the 1968 Florida Constitution and continued with the jurisdictional reforms of 1980. The authors believe that the present operations and jurisdiction of the Florida Supreme Court are one of the success stories of the state's efforts to modernize its governmental structure in recent decades. This article examines how that constitutional mandate is translated into the Court's daily functions.

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1. See FLA. CODE JUD. CONDUCT Canon 3 (West 1993).

2. The current high-technology security barriers are a recent addition, dating only to the fall of 1989. They were added as a result of violent attacks inside courtrooms that have occurred elsewhere in Florida and the nation, and because of threats received by some members of the court. Prior to 1989, security was far more lax, and it was not unusual for persons to walk off the street and into a justice's office.

## II. THE ROUTINE OPERATIONS OF THE COURT

Although the internal procedures of the Court are not widely known, they follow a fairly well defined code. A few rules have been distilled into the *Supreme Court Manual of Internal Operating Procedure*<sup>3</sup> and portions of the *Rules of Judicial Administration*,<sup>4</sup> though these by no means contain all or even most of the principles by which the Court operates. Some of the flavor of day-to-day Court operations can also be obtained from other works detailing the Court's history.<sup>5</sup> The purpose of this section is not to belabor material that can be obtained elsewhere, but to review the more significant operations regulated by the Court's customary, unwritten code,<sup>6</sup> some aspects of which date to the Court's first sessions in 1846.

Much of the mystery behind the Court's daily operations arises from the fact that almost none of the internal machinery is visible to public view. Unlike the Legislature with its committee system or the Executive branch with its cabinet meetings and press liaisons, the Court's meetings and research—apart from oral arguments—are entirely secret until the release of an opinion or order. The most important meetings of the seven justices occur during conferences that are closed even to the Court's own staff, and the Court has never found any necessity for maintaining a permanent press liaison.<sup>7</sup>

This lack of daily contact with the public is an unfortunate feature, but one born out of a necessity. The Court must retain absolute impartiality until the day a case is decided. The constitutional requirement of due process,<sup>8</sup> among other reasons, gives litigants a right to have their cases reviewed in an impartial forum. Out of deference to due process, the Florida Code of Judicial Conduct requires judicial impartiality and prohibits judges and their employees from talking about pending or impending<sup>9</sup>

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3. See SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES.

4. FLA. R. JUD. ADMIN. 2.030.

5. E.g., Joseph A. Boyd, Jr., et al., *A History of the Florida Supreme Court*, 35 U. MIAMI L. REV. 1019 (1981).

6. Of course, it will be necessary to reiterate a few matters addressed in the *Supreme Court Manual of Internal Operating Procedures* in order to lay the groundwork for a discussion of the Court's unwritten procedures. The authors also note that there are some aspects of Court operations that are confidential for a variety of reasons. These will not be discussed here.

7. Most routine releases of court-related information are handled by the Clerk of the Court or the staff of the Chief Justice.

8. FLA. CONST. art. I, § 9.

9. The terms pending and impending convey an important distinction. A case is pending if it has been properly filed and is awaiting review. A case is impending if Court personnel

proceedings except through briefing, internal discussions among Court personnel, and the adversarial process.<sup>10</sup> As a general rule, no such discussion outside the secrecy of the Court is permitted while a case is pending or impending unless all parties to the case are given a chance to participate and respond.<sup>11</sup>

Yet, the procedures leading up to the release of a written opinion or order are by far the most important work of the Court. Binding precedent may be created in this way, affecting the lives of all Floridians. Even citizens elsewhere in the United States can be affected. Florida is a major state, and its courts' opinions are often used for guidance in other states' courts throughout the nation.<sup>12</sup> It appears paradoxical that a state like Florida, which is so deeply committed to "government in the Sunshine," is required by its constitution to conduct the bulk of its judicial proceedings in secret. However, there clearly is no other way to preserve litigants' rights under the rule of due process. Unlike legislators or governors, judges and their employees cannot be required or allowed to take public stands on pending or impending matters that are yet to be resolved.

#### A. A Case Study: *In re T.A.C.P.*

In an effort to dispel some of the lack of knowledge that this mandatory secrecy has created, this article will begin by reviewing the internal process by which a recent case, *In re T.A.C.P.*,<sup>13</sup> was decided. Understanding how this case was handled may give a broader perspective on the Court's operations and exercise of its constitutional powers.

The case was chosen for several reasons. First, it presented an issue that has never been decided by any other court in the United States: Whether a terminally ill child, born without a complete brain but whose heart is still beating, can be considered "dead" for purposes of organ donation.<sup>14</sup> Thus, the case has potentially set a national precedent that will be considered by the courts of other states in confronting the same issue. Second, the decision *In re T.A.C.P.* has become final and thus, there is no

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have reason to suspect that it will eventually be filed for review.

10. FLA. CODE JUD. CONDUCT Canon 3 (West 1993).

11. *Id.*

12. *E.g.*, *Kerans v. Porter Paint Co.*, 575 N.E.2d 428 (Ohio 1991) (adopting analysis developed in *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099 (Fla. 1989)).

13. 609 So. 2d 588 (Fla. 1992).

14. *Id.* at 589.

ethical impediment in discussing it to a limited extent.<sup>15</sup> Lastly, the case received wide publicity and is, therefore, better known than most cases decided by the Court.

In March 1992, justices and employees of the Court became aware through media reports that a child, known in court records as T.A.C.P. and popularly known as "Baby Theresa," had been born in South Florida with the medical condition known as "anencephaly." Anencephalic children lack the upper portions of their brains and have only a partial skull, which leaves the remaining brain tissue open to the air. The condition is invariably fatal because the incomplete brain is unable to maintain a heartbeat for very long, partly because the exposed brain tissue is disrupted by infection or the process of childbirth.<sup>16</sup>

News accounts of cases like *T.A.C.P.* often are the Court's first warning that a major case may be impending for review. The Florida Supreme Court library stocks current major Florida newspapers each working day, and the justices and their staffs commonly examine the papers for such information. The news accounts, however, are used primarily for the knowledge that a new case may be impending<sup>17</sup>—not for the substance of the news accounts. The Court knows that news accounts sometimes contain misleading or incomplete information, though they may be informative for other purposes.

In *T.A.C.P.*, the sole question before the Court was whether organs could be removed from a child born with so serious a birth defect that she must inevitably die in a few days' time. The parents' request in this regard was both poignant and touching. They had known of their daughter's congenital defect prior to her birth but had decided to carry her to term so her organs could be donated to help other children. The parents' hope was that their own tragedy might be redeemed by saving the lives of others who needed transplantable organs, especially other infants. As the Court itself recognized in its later opinion, there is a continuous and pressing national need for organs that can be transplanted into infants.<sup>18</sup>

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15. The authors will not discuss the legal significance of the opinion, only the process by which it was shepherded through the court. Nor will matters be discussed that fall within the secrecy of the court.

16. *In re T.A.C.P.*, 609 So. 2d at 590-91.

17. Justices and their staffs actually have a need to know this information, because the ethics codes applicable to them prohibit public comment on impending cases. The news accounts help put the court on notice that silence now is required.

18. *In re T.A.C.P.*, 609 So. 2d at 591.

However, health care providers refused to comply with the parents' wishes because the child had a heartbeat independent of life support. The providers feared they might run afoul of the law if they removed the child's organs for transplant.<sup>19</sup>

A rather speedy round of lawsuits ensued. The parents sued for a judicial determination that T.A.C.P. was dead and that her organs could be donated, notwithstanding the heartbeat. A Broward County trial judge declined their request.<sup>20</sup> The parents then filed an emergency motion in the Fourth District Court of Appeal, in effect suing the trial judge. They asked that the district court overturn the trial judge's determination and direct that T.A.C.P. be declared dead. The intermediate appellate court declined to do so.<sup>21</sup>

At this point, the Florida Supreme Court's jurisdiction was invoked by the parents. Initially, they filed a petition for a writ of mandamus, one of several legal matters over which the Court has "original" jurisdiction.<sup>22</sup> When issued by a court, a writ of mandamus directs a public official to perform duties that he or she is obligated to undertake. Baby Theresa's parents, in essence, were asking the Florida Supreme Court to order the trial judge in South Florida to rule that their daughter was dead. On March 30, 1992, the Florida Supreme Court denied the motion without comment.<sup>23</sup>

At virtually the same time, however, the Fourth District Court of Appeal took the extraordinary step of certifying the case as a question of great public importance requiring immediate resolution by the Florida Supreme Court.<sup>24</sup> This created an entirely new basis for jurisdiction apart from mandamus. Under the Florida Constitution, a district court can authorize parties to "skip" the intermediate appellate court and directly petition the Florida Supreme Court to hear a case, although the latter has discretion to accept or to deny the petition as it deems fit.<sup>25</sup> In practice,

19. *Id.* at 589.

20. *In re Pearson*, No. 92-8255 (Fla. 17th Cir. Ct. Mar. 27, 1992).

21. *In re T.A.C.P.*, No. 92-0942 (Fla. 4th Dist. Ct. App. Mar. 27, 1992).

22. See FLA. CONST. art. V, § 3(b)(8). Original jurisdiction means simply that the case can be originated in the Florida Supreme Court without need of proceeding through a trial court first. Mandamus is discussed *infra* notes 532-63 and accompanying text.

23. *In re T.A.C.P.*, No. 79,581 (Fla. Mar. 30, 1992) (mem.).

24. *In re Pearson*, No. 92-0942 (Fla. 4th Dist. Ct. App. Mar. 30, 1992) (order); see *In re T.A.C.P.*, 609 So. 2d at 589.

25. FLA. CONST. art. V, § 3(b)(5). This type of jurisdiction popularly is called "pass-through jurisdiction." See *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1146 (Fla. 1985).

such cases are almost always accepted for review.<sup>26</sup>

Within hours, the press reported that Baby Theresa had died.<sup>27</sup> The Florida Supreme Court, nevertheless, chose to exercise its inherent authority to review the case on the grounds that it presented an issue of great public importance "capable of repetition yet evading review." This is a long-standing traditional basis for hearing cases that have a tendency to be rendered moot by physical events before a court of final jurisdiction can decide them.<sup>28</sup> Anencephalic children are likely to die before litigation can be completed; a decision to dismiss the case as moot thus might forever bar an appellate court from deciding the issue. The result would be the perpetual lack of a controlling court decision on a legal issue obviously capable of recurring. Accordingly, the case was scheduled for oral argument on September 2, 1992, during the first oral argument week<sup>29</sup> after the regular summer recess had ended.<sup>30</sup>

During the summer recess, the Florida Supreme Court library staff,

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26. See *infra* notes 498-516 and accompanying text. The Florida Constitution creates a distinction between the terms "appeal" and "review." Appeals constitute those appellate cases in which the Florida Supreme Court must hear the case. See FLA. CONST. art. V, § 3(b)(1), (2). Reviews are those appellate cases in which the Florida Supreme Court merely has discretionary jurisdiction. See FLA. CONST. art. V, § 3(b)(3)-(6). The court traditionally has observed another standard for judicial nomenclature relevant to the distinction between appeals and reviews. For appeals, the court either affirms or reverses the decision below; for reviews, the court either approves or quashes the decision below. By contrast, when the court expressly agrees or disagrees with a decision *other than* the one below, the court "approves" or "disapproves" the decision. On occasion, there may be lapses in the use of this nomenclature, but the convention now is well established as a matter of court custom.

27. *Baby Without Viable Brain Dies, But Legal Struggle Will Continue*, N.Y. TIMES, March 31, 1992, at A14.

28. *In re T.A.C.P.*, 609 So. 2d at 589 n.2 (citing *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984)).

29. By tradition, the Florida Supreme Court usually observes its regularly scheduled oral arguments during the first full business week of each month, with the exception of July and August when no oral argument usually occurs. However, the chief justice has discretion to schedule the regular oral argument calendar as may be necessary. For example, oral argument sometimes is scheduled for weeks in which the Monday or Tuesday is the last day of a month. Special oral arguments can be scheduled at other times by the chief justice, a practice that especially occurs when the court deems oral argument necessary on a pending death warrant, in some requests for advisory opinions, in cases involving pressing constitutional questions, and in other emergency matters.

30. The Florida Supreme Court traditionally observes a summer recess that usually occurs from the middle of July through the middle of August, but occasionally has been observed earlier or later. The suspension of a regular oral argument calendar in these two summer months is a traditional consequence of the summer recess.

assisted by summer law student interns, began compiling legal, medical, and ethical books and articles that had studied anencephaly. Compilation of such materials largely was complete by the end of the summer, so that the Court would have the benefit of the widest range of scholarly views on the subject. Of course, such materials in no way are used to reflect on the actual facts of the case at hand, but rather to enlighten the Court as to opinions of experts on the purely legal and medical questions at stake. In *T.A.C.P.*, for example, the Court heavily relied on a medical definition of "anencephaly" published by the New England Journal of Medicine, which represented a consensus view among medical experts in fields such as pediatrics, neurology, and obstetrics.<sup>31</sup>

The oral argument in *T.A.C.P.*, in early September 1992, was high-profile and well attended. Virtually the entire Tallahassee capital press corps was present, as were a large number of persons associated with children's rights groups, some of which had filed *amicus* briefs in the case. Immediately following oral argument, several persons from the various groups in attendance held impromptu press conferences in the rotunda of the Supreme Court Building. The scene was one of the liveliest in recent Court history.

In *T.A.C.P.*, as with most other cases orally argued, the Court immediately held a closed-door conference the afternoon of the argument. Neither the public nor the Court's own staff are allowed to attend such conferences. At this point, the justices tentatively voted on how the case should be decided. The official Court file was then transmitted to the office of the justice assigned to the case, for a proposed majority opinion to be drafted and circulated to the Court.<sup>32</sup>

*T.A.C.P.* was decided quickly by the usual standards of the Court. The normal elapse of time between oral argument and the release of an opinion can be as short as a few months, although the Court attempts to render decisions within six months of oral argument or submission of the case without oral argument.<sup>33</sup> Occasionally, the duration can be longer in especially difficult cases.<sup>34</sup> The *T.A.C.P.* opinion was released quickly,

31. *In re T.A.C.P.*, 609 So. 2d at 590 (citing David A. Stumpf, et al., *The Infant with Anencephaly*, 322 NEW ENG. J. MED. 669, 699 (1990)).

32. The process of opinion writing and voting on cases is discussed more fully *infra* notes 39-56 and accompanying text.

33. FLA. R. JUD. ADMIN. 2.085(d)(2).

34. *See id.* In rare cases, the Court fractures so badly that no single justice is able to obtain the concurrence of three other justices in a decision, which the Florida Constitution requires for any decision to be binding. *See* FLA. CONST. art. V, § 3(a). Release of any opinion thus may be delayed for unusually long periods of time while members of the Court seek a compromise. It is very rare, however, that the Court is completely unable to reach

just over two months after oral argument, on November 12, 1992.<sup>35</sup> The decision was unanimous.<sup>36</sup> Although some of the parties and *amici* criticized the decision in published press accounts, none filed a motion for clarification or rehearing. The opinion thus became final without further challenge. This is an unusual event because motions for clarification or rehearing are filed almost routinely. At this point, the Court's work was done.

### B. *Internal Case Assignments & Opinion Writing*

As the discussion of *T.A.C.P.* indicates, the Court's work in writing official opinions is not conducted by all seven justices simultaneously. Rather, work is delegated to individual offices. The system by which this delegation occurs is perhaps one of the least understood aspects of the Court's routine operations. As a result, on some occasions, parties have erroneously assumed that particular justices have some unusual or unfair ability to control case assignments. The reality is very nearly the opposite.

The actual method by which cases are assigned in the Florida Supreme Court differs substantially from that used in the United States Supreme Court, in which seniority equates to power. In the latter Court, the assignment typically is made by the Senior Justice who is in the majority, with the Chief Justice always considered more senior than any other Justice. Thus, Senior Justices in the nation's highest court do, in fact, have an unusual ability to control case assignments.

In the Florida Supreme Court, however, the bulk of cases in which opinions must be written<sup>37</sup> are assigned at random by the Office of the

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some decision in which at least four justices agree. When that happens, the Court's precedent holds that the lower-court opinion under review is automatically affirmed or approved for want of a majority or, if the Court's original jurisdiction is being invoked, the relief requested is deemed to be denied. Opinions issued in the absence of a four-member majority set no precedent and do not constitute a decision for legal purposes. *See State v. Hamilton*, 574 So. 2d 124, 126 n.5 (Fla. 1991) (citing *Powell v. State*, 102 So. 652 (Fla. 1924)); *State ex rel. Albritton v. Lee*, 183 So. 782 (Fla. 1938); *Honaker v. Miles*, 171 So. 212 (Fla. 1936). Thus, the doctrine of *stare decisis* does not apply to such cases.

35. *In re T.A.C.P.*, 609 So. 2d at 588.

36. *Id.* at 589, 595.

37. This article will not discuss the large volume of motions and petitions that are disposed without an opinion for lack of merit. For example, the Court receives numerous petitions for habeas corpus, mandamus, and similar extraordinary writs from Florida inmates. Relief is denied most of the time, but where the petition appears to have merit, the assigned justice (sometimes with the advice or consent of other justices) will order a response from the State. If the case still appears to have merit in light of the response, the Court then will



Clerk, and assignments typically are made as soon as briefing is completed. There are, however, some exceptions, discussed below.<sup>38</sup> In other words, case assignments in the Florida Supreme Court are generally accomplished by a kind of lottery system. This can lead to some very interesting situations when the justice assigned to write a majority opinion in a case disagrees with the majority viewpoint.

After assignment, the case file is sent to the office of the designated justice, who then usually will assign one of that office's law clerks to begin preparing the case. The process that follows varies somewhat depending upon the type of case at issue. There are four broad categories of cases in which an opinion will be written: (1) cases scheduled for oral argument; (2) cases accepted without oral argument ("no request" cases); (3) petitions by death-row inmates ("death cases"); and (4) special cases, often requiring expedited consideration by the Court.

### 1. Oral Argument Cases

In all cases scheduled for oral argument, the law clerk assigned to the case is required to write an "oral argument summary" that contains a condensed, objective version of the parties' briefs. No recommendation regarding the case's disposition is included.<sup>39</sup> In some offices, the law clerk is required to prepare a separate bench memorandum for the personal use of the justice, but this practice is not uniform throughout the Court. Bench memoranda sometimes are shared with other justices; this practice, however, is more the exception than the rule. In other offices, no memorandum is prepared, and the law clerk and justice simply sit down together and discuss the case prior to the date of oral argument.<sup>40</sup>

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accept jurisdiction, and the office to which the petition was originally assigned will usually be assigned to write the opinion. The process of opinion writing in such cases is essentially the same as in any other.

38. See *infra* notes 70-73 and accompanying text.

39. Some district courts of appeal, on the other hand, require clerks to include a recommendation as to disposition.

40. Oral argument summaries, bench memoranda, and other documents associated with the preparation of a case are internal court documents and thus cannot be released to the public or any person not on the court's staff. Violation of this rule is considered an ethical breach and can be punished by contempt of court. In 1974, for example, the Court ordered one of its law clerks to show cause why he should not be held in contempt for releasing copies of oral argument summaries to unauthorized persons. Based on the mitigating evidence, the Court withheld a contempt citation but publicly reprimanded the law clerk and placed him on probation for a period of two years under close supervision. *In re Schwartz*, 298 So. 2d 355 (Fla. 1974).

As noted earlier in the discussion of *T.A.C.P.*, a closed-door conference of the seven justices is usually held the afternoon after oral argument, although conference may be delayed up to a few days due to conflicts in the schedules of the justices. In some district courts of appeal, law clerks are permitted to attend court conferences or are even asked to participate in the judges' discussion of cases. However, in the Florida Supreme Court, the strict secrecy surrounding court conferences forbids the admission of any law clerk into a conference. Indeed, no one but the justices themselves are allowed into any official court conference. There is a single exception to this rule. By custom, the Clerk of the Court may be admitted, but usually is not required to be present unless requested by the justices.

If any other Court staff members need access to a justice or the Clerk of the Court during a conference, they are permitted only a single liberty that is seldom exercised: knocking on the conference room door. By custom, the Clerk, if present, answers the door. In the Clerk's absence, the most junior justice in the room answers the door. Staff members may not enter the room while a conference is in session, but they can ask the person answering the door to deliver a message inside or to convey materials to a justice. Non-staffers are not permitted to interrupt a conference for any reason.

The secrecy surrounding conferences means that most justices, and especially the justice assigned to write the particular case, must take notes regarding the positions espoused by the other members of the Court. During the conference, all the justices are given a chance to indicate their initial and tentative preferences regarding a case's disposition.<sup>41</sup> These preferences are noted by the justice already assigned to write the opinion.

Responsibility for opinion writing varies from office to office in the Court. Some justices prefer to write their own opinions, with law clerks often being asked to check the finished product for accuracy and style. Other justices assign law clerks the responsibility of drafting most opinions, with the justice then reviewing the draft and making any changes deemed necessary. In still other offices, opinion writing is a shared responsibility of both the justice and the assigned law clerk, and may, in fact, involve every staff member in that office at some point in the process.

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41. These preferences are by no means final. Justices frequently change their minds after giving a case more thought, after closer review of the record or the law, or after another justice proposes a method of analysis that seems more correct. On occasion, the Court has decided a case completely contrary to the initial conference vote, although such instances are the exception rather than the rule.

The exact way an opinion will be written may be discussed in conference, but it usually is left to the discretion of the assigned justice subject to some significant exceptions. For example, the Court has promulgated a system of legal style contained in a Rule of Appellate Procedure.<sup>42</sup> For matters not covered in the Rule, style is governed by the latest edition of *The Bluebook: A Uniform System of Citation* published by The Harvard Law Review Association. If nothing in The Bluebook is on point, style is governed by the *Florida Style Manual* published by the Florida State University Law Review in Tallahassee.<sup>43</sup> If none of these sources are on point, the Court generally considers that style should be governed by the closest analogous rule or example contained in the three sources listed here, in the same order of preference. As a practical matter, most authorities not covered by the rule and style manuals are Florida documents, and these typically are dealt with by reference to the closest analogous rule or example from the *Florida Style Manual*.

Another significant exception deals with gender-specific language. In the wake of a report by a Court commission investigating gender bias,<sup>44</sup> the Court now has instructed its staff and the Florida Bar agencies charged with developing Rules of Court to avoid all gender-specific language wherever possible. The purpose is to avoid masculinizing language, which suggests an inferior status of women. The most common methods of complying with the rule are to use plural pronouns instead of singular,<sup>45</sup> and to rewrite sentences so that gender-specific language is not needed. Strained language and newly coined words are also avoided.

The parties to a cause have their greatest opportunity to influence the Court in their briefs. Briefs are summarized and read prior to oral argument and thereby introduce the Court to the case. Therefore, a bad brief is a bad first impression, whereas a strong brief can sway the Court. Some cases may be won in oral argument, but these are a minority and usually involve close issues. Oral argument primarily allows the justices to test the strengths and weaknesses of first impressions created by reading the briefs. As a result, attorneys should scrupulously prepare their briefs to the Court.

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42. See FLA. R. APP. P. 9.800.

43. FLA. R. APP. P. 9.800(n) (referencing *Florida Style Manual*, 19 FLA. ST. U. L. REV. 525 (1991)); see also *Florida Style Manual*, 15 FLA. ST. U. L. REV. 137 (1987).

44. See *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990).

45. In the English language, plural pronouns are inherently gender-neutral.

Style and content of briefs are governed by court rule;<sup>46</sup> beyond that, counsel should avoid anything that creates confusion as to facts and issues. One practice sometimes used by respondents or appellees, for example, is to ignore the sequence of issues framed by the petitioners or appellants. This creates needless confusion and should be avoided. If the issues in the briefs do not match one another, the Court then must perform a kind of mental “cut and paste.”

The better practice is to address the issues in the same sequence, even if only to note that an issue is redundant or irrelevant, and then to list separately and to discuss any issues the opponent may have failed to raise. Another practice to avoid is incorporating by reference an argument from a brief in a different proceeding or different court, except when the Court grants leave to do so. Often the other brief may not be readily available, which renders the later brief unintelligible. It is always better to make sure a complete statement of the argument can be found within the four corners of the brief.

One peculiarity of the Court’s method of case assignment is that the assigned justice sometimes is not in the majority. Under long-standing Court custom, this fact alone does not necessarily disqualify that justice from writing the proposed majority opinion. There are several possibilities of what could happen next. Most often, the assigned justice will agree to write an unsigned “per curiam” opinion<sup>47</sup> reflecting the views of the majority, with the justice also writing a separate opinion expressing any contrary views.

However, on occasions when the conference vote is close or fails to establish a tentative majority, the assigned justice may circulate a proposed majority reflecting that justice’s views, with the hope that other offices will find the analysis compelling. Less commonly, a justice may circulate two or more proposed majority opinions in the same case, thereby giving the Court options from which to choose. If an assigned justice truly feels unable to develop the majority’s proposed opinion, the case can be reassigned to another justice at conference. All reassignments lie within the discretion of the chief justice, though in practice the case is usually transferred to the justice in the majority who has most fully researched and analyzed the case.

Once a proposed majority opinion is circulated, each justice must vote on the proposal. A “vote sheet” is attached to the top of each proposed

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46. FLA. R. APP. P. 9.210, 9.800.

47. Per curiam opinions are discussed *infra* notes 101-106 and accompanying text.

opinion and includes a listing of each kind of vote that is possible for the type of case in question.<sup>48</sup> All voting is done manually on the vote sheets, with the justices voting by placing their initials next to the vote they prefer.<sup>49</sup> By custom, the justices usually can cast only three types of votes that do not require them to write a separate opinion. These are "concur," "concur in result only," and "dissent."<sup>50</sup> In addition, each justice can write a separate opinion if desired. The various kinds of separate opinions are somewhat more complicated and are discussed more fully below.<sup>51</sup>

All separate opinions are accompanied by their own separate vote sheets, and every justice must manually vote on each one in much the same manner they vote on a proposed majority opinion. Once all vote sheets are returned to the clerk's office, one of two things will occur. If the case has generated no further controversy among the justices, it will be routed to a staff member in the chief justice's office to be checked for substantive and stylistic problems, then scheduled for release to the public.

However, if some controversy remains, the case will be scheduled for a second Court conference. Any justice can send a case to conference simply by placing a question mark on any vote sheet from the case. When the clerk's office sees the question mark, the case is routed to a staff member in the chief justice's office to be included on the next available conference agenda.<sup>52</sup> At conference, the justices will discuss the case and

48. The possible votes vary slightly according to the kind of case.

49. If a justice is out of town and there is a pressing need for a vote on the case, the justice by telephone may authorize a staff member to indicate the proper vote on the vote sheet.

50. These votes mean precisely what they say. Concur indicates a full acceptance of the majority opinion and decision. Concur in result only indicates an acceptance only of the decision, and a refusal to join in the analysis expressed in the opinion. Dissent indicates a refusal to join in either the decision or opinion. Members of the court usually do not vote "specially concur" or "concur in part and dissent in part" unless they also write a separate opinion, although there are exceptions even here. *E.g.*, *Maison Grande Condominium Ass'n, Inc. v. Dorten, Inc.*, 600 So. 2d 463, 465 (Fla. 1992) (McDonald, J., concurring in part, dissenting in part). Moreover, in death penalty cases, each justice votes separately as to conviction and sentence. Therefore, a justice can concur as to the conviction but dissent as to the sentence without writing a separate opinion. *E.g.*, *Maharaj v. State*, 597 So. 2d 786, 792 (Fla. 1992) (McDonald, J., concurring as to conviction, dissenting as to sentence). Though less common, justices also may vote separately as to punishment in cases of attorney discipline. *E.g.*, *The Florida Bar v. Morse*, 587 So. 2d 1120, 1121 (Fla. 1991) (McDonald, J., concurring as to guilt, dissenting as to punishment).

51. See discussion *infra* part II.C.

52. Conference agendas are produced by the office of the chief justice.

decide on any further action that may be necessary. Frequently, only minor revisions are made in opinions to satisfy the concerns of particular justices.

Occasionally it becomes apparent during a conference, or after voting, that a majority of the Court does not agree with the proposed opinion that was circulated. When this happens, the Court's custom is that the chief justice has discretion to reassign the case to a justice in the majority. Reassignments usually occur during a Court conference upon the advice of the other justices, but sometimes are decided more informally.<sup>53</sup> However, the original author of the "failed" majority opinion sometimes may be given an opportunity to write a new *per curiam* opinion that conforms to the majority's views, perhaps accompanied by a separate opinion expressing any divergent views of the author. The latter action is more likely in complex cases already involving considerable time spent on research and writing.

Once all questions regarding a case are settled and the opinion or opinions have been proofread, the clerk's office will set a tentative date for the opinion to be released. However, no opinion can be issued except upon the signature of the chief justice. Typically, opinions are scheduled for release no earlier than a week in advance,<sup>54</sup> and copies of the final version of the opinion or opinions are then circulated to all justices and each member of their staffs prior to release. The purpose of this last exercise is to allow for further proofreading of opinions. Justices and their staffs sometimes find errors or inconsistencies not caught during the normal proofreading process.

By Court custom, the regular day for issuing opinions is each Thursday when the Court is in session.<sup>55</sup> Copies of opinions are then made available to the press and the public, often no later than by 10:00 a.m. The opinions, however, are not considered final until any motion for rehearing or

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53. For example, a justice may have written a separate dissenting opinion that clearly reflects the views of at least four members of the court. In such cases, the court's majority and the chief justice may agree informally among themselves that the author of the dissent will simply recast the dissent as a majority and circulate it to the full court without need for a conference discussion. In that case, the now-failed "majority" opinion may be recast as a dissent.

54. This is not true, however, of some emergency cases such as collateral challenges by death-row inmates scheduled for execution. When some urgency is involved, the chief justice has discretion to order opinions released at any time after voting is finalized and the justices have resolved any differences as fully as is possible.

55. Opinions are not issued during the court's summer recess, except for opinions already finalized that could not be released before recess began. Opinions also are not released if none are available, an event common immediately after recess ends.

clarification is disposed of, although there are some cases in which the Court notes that rehearing or clarification will not be entertained.<sup>56</sup>

## 2. "No Request" Cases

A substantial percentage of the Court's docket consists of cases in which oral argument is not granted. These can include cases in which oral argument was sought but denied, the majority of contested Bar discipline cases, and a few other categories. Once the case is submitted to the Court without argument, a more summary process is followed than otherwise would occur.

After all briefing is complete, the "no request"<sup>57</sup> case is usually randomly assigned to an office<sup>58</sup> where the justice then gives the case to a law clerk. Both the justice and law clerk review the file and make a determination whether the case poses a question that has an obvious answer. For example, any case that can be readily approved or quashed in light of other recent or pending cases falls into this category. Where the answer is obvious, the law clerk, or occasionally the justice, will prepare a summary opinion approving or quashing in light of the controlling precedent.

Another procedure is followed where the question posed by the "no request" case appears to be more controversial, such as where reasonable persons could differ as to the outcome. This might exist, for example, where two separate district courts of appeal have reached inconsistent but equally reasonable conclusions regarding the same issue of law. In these circumstances, the law clerk assigned to the case will prepare a memorandum that essentially is a hybrid of an oral argument summary and a bench memorandum for circulation to the entire Court. The first part of this memorandum summarizes in objective fashion all the relevant facts and

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56. The Court routinely notes that it will not entertain motions for rehearing or clarification in cases requiring immediate finality, such as cases in which a death warrant is pending, or after an opinion has been revised upon the granting or denial of a motion for rehearing or clarification.

57. The term "no request" refers to the fact that the Court has made no request for oral argument by the parties. In appropriate cases, it may also refer to the fact that the parties themselves have not requested oral argument. There is no absolute right to oral argument in any case, although the court's manual of internal operating procedures requires that oral argument always be scheduled in every appeal from a judgment imposing a death sentence. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(B)(3).

58. There are exceptions to the random assignment process, most commonly, where a number of cases all pose the same issue. In such circumstances, all the cases may be assigned to the same office.

information about the case, as well as the parties' arguments. In the second part, the memorandum discusses the options available to the Court and states the disposition preferred by the justice to whom the case is assigned.<sup>59</sup>

The case is then scheduled for discussion at the next available court conference. At this time, the justices state their own preferences regarding the case and a vote is taken. The assigned justice then either drafts a proposed majority opinion or assigns the law clerk to do so. The proposed majority opinion is circulated to the entire Court using the same procedure that would occur had oral argument been granted. Any differences among the justices are resolved in the same manner as would apply in oral argument cases, including additional conference discussions as needed. Once all the justices are satisfied that no further controversy remains about the case, the majority opinion and any separate opinions are prepared for public release.<sup>60</sup>

### 3. Death Cases

While appeals from judgments imposing the death penalty are treated like any other oral argument case, the Court traditionally follows a somewhat different procedure in collateral challenges by death-row inmates. Many of these cases involve claims raised via a traditional habeas corpus petition or through the related procedure set forth in Florida Rule of Criminal Procedure 3.850.<sup>61</sup> Occasionally, other means of collateral review are sought, including the Court's "all writs" jurisdiction,<sup>62</sup> mandamus,<sup>63</sup> or other means. The most pressing of these cases involve claims by inmates who have been scheduled for execution.

Except where there is an active death warrant, collateral challenges are handled much the same as other cases. Oral argument is sometimes granted but can be denied—unlike in appeals from judgments imposing the death penalty where oral argument is always granted.<sup>64</sup> Some justices require their staffs to prepare a fact-sheet detailing the entire procedural history of

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59. The use of this memorandum process in more controversial "no request" cases is a recent innovation introduced by Justice Stephen Grimes and modeled after a similar procedure used when he was a member of the Second District Court of Appeal.

60. "No request" cases are prepared for release in the same manner as other cases.

61. Although habeas corpus and Rule 3.850 have some differences, the Court has held that the latter is a procedural vehicle for providing relief otherwise available through habeas corpus. *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988); see discussion *infra* part VII.D.

62. See discussion *infra* part VII.E.

63. See discussion *infra* part VII.A.

64. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(B)(3).



the case, from trial to the latest collateral challenge, but this practice is not uniform throughout the Court. Opinions are usually issued for each collateral challenge filed, though the Court sometimes denies a claim in a summary order if the claim clearly is barred or meritless.

When a case involves an active death warrant, different procedures are used. Litigation often comes at unpredictable times and typically must be decided on a severe deadline.<sup>65</sup> Thus, the office to which the case is assigned frequently must review the record<sup>66</sup> immediately after the warrant is signed and before any pleadings have been filed in the Florida Supreme Court. Typically, the justice and law clerk assigned to the case confer as soon as possible to discuss any claims that seem likely based on the record.

As soon as pleadings are received from the inmate and the State, the justice and law clerk assigned to the case usually meet immediately. The justice then may confer informally with the other justices or request that a court conference be held, if one seems necessary. If the case seems to involve a meritorious claim, the Court may be inclined to grant an emergency oral argument, or may stay the execution until the matter can be studied further and an opinion issued.

In the absence of a viable claim, the justice or law clerk assigned to the case usually prepares an opinion (or in some cases a summary order) denying all relief. If a proposed majority opinion is prepared, a copy faced with a vote sheet will be circulated to the Court on an expedited basis and, once all votes are tabulated, will be issued to the public immediately. Summary orders may be handled in a formal or informal court conference, with the order itself later issued by the Clerk of the Court.

As the time for the inmate's execution approaches, the justice and law clerk assigned to the case remain on call for any last minute petitions that may be filed. By custom, the chief justice or a justice designated by the chief justice will be present in the Supreme Court Building at the time of execution and is usually assisted by the Clerk of the Court and sometimes also by the law clerk assigned to the case.<sup>67</sup> The Governor or a member

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65. Because of the Florida Supreme Court's mandatory role in reviewing death cases, the Governor, by long-standing tradition, does not sign death warrants to be effective during the time when the Court will be in its summer recess. *See* FLA. CONST. art. V, § 3(b)(1), (9) (requiring the supreme court's review of death penalty cases).

66. All records of death-row inmates remain stored in the Florida Supreme Court's vaults or in the Florida Archives located across the street from the Supreme Court Building, and are thus readily accessible to the staff.

67. The law clerk's presence may be especially important if there is any concern that a legal issue might be raised at the last minute.

of the Governor's staff opens a three-way telephone line connected with the death cell of the state prison and the designated justice and all three parties remain on the phone until the execution is completed and the inmate is declared dead. Under the Florida Constitution, any single justice could order the execution stayed for good reason shown,<sup>68</sup> but this power has not been exercised in memory. Any problems associated with the execution generally are reported back to the full Court.<sup>69</sup>

#### 4. Other Special Cases

The Court sometimes receives other more unusual kinds of cases, often involving emergency issues that will be resolved in a written opinion. Examples include: pressing constitutional questions between the branches of state government;<sup>70</sup> requests for an advisory opinion by the Governor;<sup>71</sup> or a petition to invoke the Court's own emergency rule-making powers.<sup>72</sup> Oral argument often is granted in cases of this type, though not always, with argument usually scheduled as soon as possible. Whether accepted for argument or not, emergency matters are normally handled like any other case, except that preparation of the opinions typically is expedited and the case is assigned to an office by the chief justice.<sup>73</sup> The opinions themselves may be released outside the normal cycle if necessary to better resolve the particular emergency.

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68. See FLA. CONST. art. V, § 3(b)(9). Of course, the full Court could probably dissolve any stay improvidently granted. See *id.*

69. For example, Florida's electric chair malfunctioned during the execution of Jesse Tafero in 1990, resulting in unusual generation of heat and the need to pass electric current through Tafero's body three separate times. This malfunction was reported back to the full Court by the justice assigned to be present in the Supreme Court Building during the execution.

70. E.g., Florida House of Representatives v. Martinez, 555 So. 2d 839 (Fla. 1990); The Florida Senate v. Graham, 412 So. 2d 360 (Fla. 1982).

71. *In re* Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).

72. *In re* Emergency Petition to Extend Time Periods Under All Fla. Rules of Procedure, No. 80,387 (Fla. Sept. 2, 1992) (emergency rule-making related to Hurricane Andrew).

73. Emergency cases are thus an exception to the Court's random assignment system. The chief justice has broad discretion over these assignments, subject as always to the will of the full Court, but often may assign the case to an office with special expertise in the field or one that is most current in its workload.

### C. *Types of Separate Opinions*

As noted above, the Florida Supreme Court follows the traditional practice of American appellate courts in assigning a single justice to write the majority opinion in a case. However, justices are not obligated to agree with the proposed majority opinion's viewpoint or even with the unsigned majorities they themselves have written. Any view apart from the majority's is expressed through the vehicle of a separate opinion attached to and published with the majority opinion.

Although about seventy percent of the Court's decisions are unanimous,<sup>74</sup> the press has a strong tendency to focus on disagreements embodied in separate opinions. Strongly worded dissents catch the most attention. This public focus can create a seriously exaggerated sense of division on the Court and may suggest that dissents carry a legal significance that they actually lack.

Dissenting views almost always are the least influential in the long term, due to the fact of their apparent rejection by the Court's majority.<sup>75</sup> A well reasoned concurring opinion, while technically not establishing any precedent,<sup>76</sup> may still be cited for persuasive authority in future cases and occasionally may become more influential than the majority opinion to which it was attached.<sup>77</sup> Dissenting views sometimes prevail in the long-run,<sup>78</sup> but this is a far rarer occurrence. To embrace a prior dissent, the Court usually must overrule its own precedent notwithstanding the doctrine

74. Records of the Clerk of the Court show that of the 3186 opinions filed between January 1, 1986, and September 30, 1992 seventy percent were unanimous.

75. See *Ephrem v. Phillips*, 99 So. 2d 257 (Fla. 1st Dist. Ct. App. 1957). It is worth noting, however, that dissents often contain statements that are "dissent dicta" because they exceed the scope of what the majority is deciding. A majority opinion should not be read as rejecting extraneous dissent dicta, but only as rejecting anything in the dissent contrary to what the majority has actually said. There are occasions when dissent dicta may later be embraced by a majority without overruling any prior opinion. Some attorneys erroneously assume that the majority necessarily has rejected everything stated in a dissent.

76. *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980).

77. See, e.g., *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So. 2d 261, 262-63 (Fla. 1990) (applying *Wheeler v. Corbin*, 546 So. 2d 723, 724-26 (Fla. 1989) (Ehrlich, C.J., concurring)).

78. E.g., *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659 (Fla. 1985), *receding from* *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980). In *Pullum*, the court expressly embraced Justice McDonald's dissent in *Battilla*, 392 So. 2d at 874-75 (McDonald, J., dissenting).

of *stare decisis*;<sup>79</sup> but a well reasoned concurrence can be accepted without overruling anything, on grounds that it illuminated or explained the majority opinion it accompanied.

Concurrences and dissents, however, constitute only two of six different kinds of separate opinions that are in customary usage by the Court. This variety has sometimes confused lawyers and the public alike, because the Court has never fully clarified what each of the categories implies. Confusion has been increased by the fact that the six categories are not necessarily discrete but often blur into one another. Much depends on exactly what the individual author has stated in the separate opinion, although the choice of category is often a strong indicator of the strength of the justice's feelings about the majority view.

Below, the six categories are ranked and their customary usage described. This ranking begins with the category having the strongest sense of concurrence and ends with the category having the strongest sense of dissent.

### 1. Concurring Opinions

A separate concurring opinion usually indicates that the justice fully agrees with the majority opinion but desires to make additional comments or observations. Concurring opinions often are used when a justice wishes to explain individual reasons for concurring with the majority. As a general

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79. Many people erroneously view *stare decisis* as rigidly inflexible. The Court, however, has held that *stare decisis* is not an ironclad, unwavering rule that the present must bend to the dead voice of the past, however outmoded or meaningless; rather, it is a rule that precedent will be followed except when departure is necessary to vindicate other principles of law or to remedy continued injustice. *Haag v. State*, 591 So. 2d 614 (Fla. 1992). In a similar vein, the Court has said that the common law will not be altered or expanded unless demanded by public necessity or to vindicate fundamental rights. *In re T.A.C.P.*, 609 So. 2d 588 (Fla. 1992). Although attorneys sometimes argue that only the Legislature can change the common law, the Court in actuality has not hesitated to change the law when proper reasons exist to do so, at least where the Legislature has taken no action on the precise subject. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957); *see, e.g.*, *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993) (abrogating common law doctrine of interspousal immunity); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (abrogating common law doctrine of contributory negligence). "Common law," of course, refers to law that has arisen from the customary practices of the courts of Florida and their predecessors, which exists in its most authoritative form when embodied in the written opinions of the Florida Supreme Court. Once common law is codified within a legislative enactment, the Court is far more hesitant to overrule it, because of the doctrine of separation of powers. *See* FLA. CONST. art. II, § 3.

rule, concurring opinions should be presumed to indicate complete agreement with the majority opinion unless the concurring opinion says otherwise. Thus, a concurring opinion can constitute the fourth vote needed to establish both a decision and a Court opinion,<sup>80</sup> subject only to any reservations expressly stated in the concurring opinion itself.<sup>81</sup>

## 2. Specially Concurring Opinions

A "specially concurring"<sup>82</sup> opinion indicates general agreement with both the analysis and result of the majority opinion but implies some degree of elaboration of the majority's rationale, unless the separate opinion itself says otherwise. The most common use of a special concurrence is when the author believes the majority's analysis is essentially correct though perhaps in need of elaboration or clarification. For example, a specially concurring opinion may be used to explain why a separate dissenting opinion has mischaracterized the majority's views and why the majority is correct.<sup>83</sup>

A specially concurring opinion can clearly constitute the fourth vote needed to create a binding decision under the state constitution<sup>84</sup> and can be sufficient to establish an opinion as binding precedent. However, in this last instance, the true nature of the precedent would not necessarily consist of the plurality opinion, the special concurrence, or even both taken

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80. See FLA. CONST. art. V, § 3(a). There is a distinction between the terms decision and opinion. The decision is the court's judgment—i.e., the specific result reached. Whereas, the opinion is the written document explaining the reasons for the decision. *Seaboard Air Line R.R. Co. v. Branham*, 104 So. 2d 356 (Fla. 1958). Thus, so long as at least four members of the Florida Supreme Court agree on the decision, it is irrelevant that no similar agreement was reached regarding a written opinion. Similarly, at least four justices must concur in an opinion for it to have any precedential value beyond the case at hand. *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980). However, the word "decision" may have a different meaning in the context of the Florida Supreme Court's jurisdiction over particular categories of "decisions." See *infra* note 341.

81. Such reservations, depending on their strength, may give the concurrence the appearance of actually being a special concurrence or a concurrence in result only. However, the fact that the author has chosen to concur necessarily implies a greater sense of agreement with the majority view. However, attorneys and lower courts may still legitimately take note of any reservations expressed in a concurrence, especially where they may indicate that at least four justices have not agreed on a relevant point.

82. Members of the Court sometimes label this type of separate opinion "concurring specially." This label is synonymous with "specially concurring." The transposition is a matter of each individual justice's preference.

83. *E.g.*, *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96, 98-102 (Fla. 1989) (Ehrlich, C.J., concurring specially).

84. FLA. CONST. art. V, § 3(a).

together. Rather, the Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed.<sup>85</sup> In other words, it is possible for a special concurrence to deprive a plurality opinion of precedential value with respect to matters about which the concurring justice has expressed reservations.<sup>86</sup>

### 3. Opinions Concurring in Result Only

A "concurring in result only" opinion indicates agreement only with the decision (that is, the result reached) and a refusal to join in the majority's opinion. A separate opinion that "concurs in result only" can constitute the fourth vote necessary to establish a "decision" under the Florida Constitution,<sup>87</sup> but the effect in such a case is that there is no "opinion" of the Court and thus no precedent beyond the specific facts of the controversy at hand.<sup>88</sup> There may be cases in which a justice writes a "concurring in result only" opinion that also appears to agree with more than just the result. However, it seems doubtful that such an action could constitute the fourth vote needed to give the opinion validity as precedent.

### 4. Opinions Concurring in Part, Dissenting in Part

An opinion that "concurs in part and dissents in part" is commonly used to indicate disagreement with only one or some of the results reached by the majority opinion, but may also be used to show disagreement with part of the analysis, depending on what the separate opinion itself says. Where an opinion of this type establishes part of the Court's majority, a

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85. An example of such a case is *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), in which Chief Justice Ehrlich specially concurred but expressed reservations about certain points in the plurality's analysis.

86. *See id.* A word of caution is in order here. It is easy and common, though not actually correct, for courts and lawyers to overlook the fact that a specially concurring opinion has expressed reservations about some legal point. For example, Chief Justice Ehrlich's special concurrence in *In re T.W.* expressed reservations about the plurality opinion, yet few courts later analyzing *T.W.* seemed much concerned with that fact. Indeed, few have even noted that *T.W.* was merely a plurality opinion; and at least one court has ignored Chief Justice Ehrlich's special concurrence, even where his comments actually supported the result being reached. *See Jones v. State*, 619 So. 2d 418 (Fla. 5th Dist. Ct. App. 1993).

87. FLA. CONST. art. V, § 3(a). For an example of a case in which the fourth vote concurred in result only, see *Dougan v. State*, 595 So. 2d 1 (Fla. 1992). The result is that there is a decision in *Dougan*—in other words, a result in which at least four justices concurred—but no court opinion.

88. *See Greene*, 384 So. 2d at 24.

careful reading of the different opinions may be needed to ascertain the actual precedent of the case.<sup>89</sup>

### 5. Dubitante Opinions

The rarest category of separate opinions are those issued "dubitante,"<sup>90</sup> a notation expressing serious doubt about the case. Only one such opinion has been issued in the Court's history, although it is recent.<sup>91</sup> With this sparse usage, it still is not entirely clear in Florida whether a dubitante opinion should be regarded as a type of concurrence or dissent or something else,<sup>92</sup> or indeed, whether a dubitante opinion can constitute the fourth vote necessary to fulfill the constitutional requirement that four justices must concur in a decision.<sup>93</sup>

In the federal system, an opinion designated "dubitante" at least sometimes appears to constitute a very limited form of concurrence,<sup>94</sup> and some federal judges have gone to the trouble of designating their opinions

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89. The Florida Supreme Court has not consistently followed the United States Supreme Court's practice of dividing opinions into numbered sections, in which members separately can indicate agreement or disagreement. There are exceptions, *e.g.*, *Traylor v. State*, 596 So. 2d 957 (Fla. 1992), but most opinions of the Florida Supreme Court are not divided in this manner. This means that a careful reading may be necessary to determine the actual majority position; and in some cases, the true majority view simply may be unclear. However, the Florida Supreme Court's practice has the grace of avoiding the fractured opinions sometimes found in the United States Supreme Court, in which two or more justices may separately write and sign parts of opinions that collectively constitute the "majority" view.

90. The term "dubitante" means doubting. BLACK'S LAW DICTIONARY 499 (6th ed. 1990).

91. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 549 (Fla. 1992) (Barkett, J., dubitante). It should be noted that other separate opinions have been written that in effect constituted a species of dubitante opinion, but without using the designation "dubitante." *E.g.*, *Johnson v. Singletary*, 612 So. 2d 575, 577-81 (Fla. 1993) (Kogan, J., specially concurring).

92. The single instance in which a dubitante opinion was issued in Florida suggests that it indicated neither a concurrence nor dissent, but rather a statement of complete doubt as to the disposition of the case. See *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d at 549.

93. See FLA. CONST. art. V, § 3(a).

94. Indeed, some federal judges have marked their separate opinions with the heading "concurring" but have indicated in the text that the opinion is "dubitante." *New York v. Halvey*, 330 U.S. 610, 619 (1947) (Rutledge, J., concurring); see also *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 403 (1967) (Douglas, J., dubitante); *Radio Corp. v. United States*, 341 U.S. 412, 421 (1951) (Frankfurter, J., dubitante).

as “concurring dubitante.”<sup>95</sup> At least one has issued a dubitante opinion that expressly concurred in part and dissented in part, although the author seemed to indicate doubts only as to the partial concurrence.<sup>96</sup>

In Georgia, the courts have sometimes issued “dubitante” dissents, apparently meaning dissenting views in which the author has serious doubt.<sup>97</sup> Thus, a “dubitante dissent” would seem to constitute a species of dissenting opinion less vigorous than a full dissent. However, there also seem to be times when an opinion marked merely “dubitante” is neither a dissent nor a concurrence, but an expression of doubts so grave that the judge or justice can neither agree nor disagree with the majority.<sup>98</sup> This probably is the best construction, for example, in those rare cases in other jurisdictions in which a judge votes “dubitante” without writing a separate opinion.<sup>99</sup>

Because of the still uncertain nature of dubitante opinions in Florida, the better practice would be for the authors to indicate whether they intend to concur, to dissent, or neither to concur nor to dissent. Perhaps a statement to that effect could be included in the text of the opinion.

In any event, a statement that the justice “concurs dubitante” certainly would seem necessary where the dubitante opinion is relied upon as the fourth vote needed to create a binding decision; but even then, it remains to be seen whether that concurrence would give the written opinion itself the value of precedent. Some diminished form of precedential value might be in order in such a situation, but only where it is clear from a careful reading of the different opinions that at least four members of the Court, in fact, have agreed on some rationale, not merely the result. Otherwise, there would be no court opinion, and the plurality’s view would not create precedent beyond the case at issue.

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95. *E.g.*, *Feldman v. Allegheny Airlines*, 524 F.2d 384, 392-93 (2d Cir. 1975) (Friendly, J., concurring dubitante).

96. *United States v. Walker*, 9 M.J. 892, 894 (A.F.C.M.R. 1980) (Mahoney, J., dissenting in part, concurring in part, & dubitante).

97. *E.g.*, *Kelleher v. State*, 371 S.E.2d 450, 451 (Ga. App. 1988) (Deen, P.J., dissenting dubitante); *City of Fairburn v. Cook*, 372 S.E.2d 245, 255 (Ga. App. 1988) (Deen, P.J., dissenting dubitante).

98. *See In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d at 549.

99. *Adams v. Williams*, 838 S.W.2d 71, 73 (Mo. App. 1992) (Crandall, J., dubitante). In the absence of a written opinion, it is impossible to tell what the author’s views were, other than an expression of doubt.



## 6. Dissents

A “dissenting” opinion should be presumed to indicate a complete refusal to join with the majority’s decision and opinion. A close reading of some dissenting opinions may disclose that the author actually only disagrees with part of the majority opinion.<sup>100</sup> Such a dissent could be read as though it were an opinion concurring in part and dissenting in part; but the fact that the justice has labeled the separate opinion as a full “dissent” almost certainly means the opinion could not constitute the fourth vote needed to create a binding court opinion or decision. As a result, it is doubtful that the dissenting justice should be viewed as joining the majority’s views for any other purpose.

### D. *Per Curiam Opinions*

At one time, the Florida Supreme Court followed the practice, still common in the district courts of appeal, of issuing very cursory opinions designated *per curiam*, with the identity of the author not disclosed. Historically, *per curiam* opinions came to imply short opinions devoid of a rationale. This was the general sense conveyed by the Court in 1956 when it defined the term *per curiam* as indicating “the opinion of the Court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by any extended discussion.”<sup>101</sup> Some attorneys have ruefully noted the potential for abuse inherent in the power to issue such opinions,<sup>102</sup> because even a “clear” rationale helps no one if left unstated.

After the creation of the district courts of appeal and the later adoption of jurisdictional reforms, the traditional short *per curiam* opinion has fallen into disuse in the Florida Supreme Court.<sup>103</sup> The Court now seldom issues unsigned opinions devoid of an obvious rationale. The few that might qualify typically involve questions of law now fully resolved in a recently issued opinion, to which the lower courts and parties are referred. Instead,

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100. *E.g.*, *In re T.W.*, 551 So. 2d 1186, 1204-05 (Fla. 1989) (McDonald, J., dissenting) (dissenting opinion agreeing with part of plurality’s rationale).

101. *Newmons v. Lake Worth Drainage Dist.*, 87 So. 2d 49, 50 (Fla. 1956).

102. Toby Buel, *Conflict Review in the Supreme Court of a District Court of Appeal Per Curiam Decision*, 56 FLA. B.J. 849 (1982).

103. The bulk of the Florida Supreme Court’s jurisdiction now is discretionary, in which case the Court has authority simply to deny jurisdiction. This is vastly different than the situation that existed when the supreme court was Florida’s only appellate tribunal, with much broader mandatory jurisdiction.

Florida Supreme Court per curiam opinions now have metamorphosed into something else all together. Increasingly, they are fully analyzed majority opinions whose authors simply are not identified. The news media typically call such cases "unsigned majority opinions."

There are a variety of reasons for not identifying the true author or authors.<sup>104</sup> One is because the author of the majority opinion actually disagrees with its analysis, an eventuality that can occur because of the Court's method of assigning cases.<sup>105</sup> Another reason is that portions of the opinion were written by more than one justice. As a matter of courtesy, justices usually avoid claiming credit for material partially written by another office. Such a per curiam opinion might be issued, for example, when a majority of the Court has not agreed with the full analysis of a proposed majority opinion and has decided to engraft onto that opinion part of a separate analysis prepared by another justice.

In other circumstances, the decision to make an opinion per curiam is left to the discretion of the justice whose offices originated the opinion. Subject to some exceptions, most Bar discipline cases and disciplinary actions against judges are now issued per curiam. The same is true of a good number of death cases, though by no means all.

There is no way for the public to know the reasons an opinion was issued per curiam and the justices and court staff are never permitted to publicly identify the true author. In any event, the fact that an opinion is issued per curiam by the Florida Supreme Court has no significant effect other than to identify the Court itself, and not any particular justices, as the author. Per curiam opinions bear the same status as any other opinion in which the justices have voted the same way.<sup>106</sup>

### E. *Role of the Chief Justice or Acting Chief Justice*

The chief justice is Florida's highest ranking judicial officer, serving both as head of the Court and chief executive officer of the entire Florida judicial branch.<sup>107</sup> The chief justice presides at all official Court functions and governs the state court system through the machinery of the Office of State Courts Administrator. One of the chief justice's most significant

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104. Members of the Court, including the true author, still must indicate their votes regarding a per curiam opinion, and those votes are recorded with the published opinion. There is no anonymity in this sense. Moreover, only a majority opinion can be issued per curiam. The Court has never issued, for example, per curiam dissents or concurrences.

105. See *supra* text accompanying note 47.

106. See *Newmons*, 87 So. 2d at 49.

107. FLA. CONST. art. V, § 2(b).

powers in a legal sense is the ability to dispose of motions and procedural matters connected with pending cases.<sup>108</sup> This is a marked change from earlier court practice, which required a meeting of the Court to consider motions. Today, some motions may be placed on the full Court's agenda for further guidance, particularly on controversial matters; but by far, most are handled by the chief justice alone.

Whenever the chief justice is absent or unable to act, the role of acting chief justice automatically falls upon the next most senior justice who is available. Most commonly, the Dean of the Court<sup>109</sup> is the acting chief justice, but on occasion so many members of the Court are absent that the duty descends to the more junior justices. The *Rules of Judicial Administration* also specify that the Dean of the Court automatically becomes acting chief justice if the sitting chief leaves office for any reason; but in that event, the Court is also required to promptly elect a successor to serve the balance of the unexpired term.<sup>110</sup>

Each chief justice's term runs for a period of two years beginning and ending on July 1 of each successive even-numbered year.<sup>111</sup> Prior to the end of each two-year term, the Court must elect the chief justice who will serve during the next term. For some time now, the Court has followed a custom that has largely eliminated political considerations in the election. By a custom unbroken for more than a decade, the Court elects as chief justice the next most senior justice who has not yet held the office.<sup>112</sup> In the unlikely event that a time comes when all seven have served, the Court presumably would begin the rotation again, starting with the Dean of the Court.

One beneficial result of this rotation system is that it lessens the possibility that any particular justice or group of justices could gain indefinite control of the Court's executive functions. This is vastly different from the United States Supreme Court, where the Chief Justice is nominated by the President subject to Senate confirmation and is life-tenured. The Florida Supreme Court's customary rotation system creates a significant check and balance omitted from the constitution itself, which specifies only

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108. FLA. R. JUD. ADMIN. 2.030(a)(2)(B)(ii).

109. The present Dean is Justice Ben F. Overton.

110. FLA. R. JUD. ADMIN. 2.030(2).

111. *Id.*

112. The custom actually predates the 1980s but was interrupted during the 1970s when some members of the Court were under investigation for alleged improprieties. The custom resumed in 1984 with the election of Justice Joseph A. Boyd, Jr.

that the Court must choose a chief justice by majority vote.<sup>113</sup> By honoring the rotation system, the Court ensures that no particular ideological bent will continuously dominate the highest level of the state's judicial branch.

#### F. *Role of the Other Justices*

The power of the chief justice, however, is not limitless. Very significant powers reside in the Court as a body, particularly through the fact that all judicial opinions and many major administrative concerns require assent by at least four justices. Moreover, the chief justice alone cannot possibly supervise all of the various committees and Bar offices under the Court's control. The effect is that the Court in practice operates on a highly collegial basis, with all of the justices involved in some aspect of administration. Accordingly, the most effective chief justices tend to be those that build a consensus before taking actions affecting the Court and its governance.

Collegiality is expressed most noticeably in the fact that each justice is assigned a variety of supervisory duties. These include: oversight of the internal committees and offices that govern the Court; liaison responsibility with Bar organizations; and assignment to a variety of special commissions created, from time to time, to address questions of public policy involving the courts. For example, members of the Court have chaired or supervised public commissions charged with reforming guardianship laws, investigating gender bias in Florida's judiciary, and examining ways to eliminate racial and ethnic bias from the judicial system. Each of these commissions ultimately produced extensive proposals for reform, most of which now have been implemented by the Governor, the Legislature, and the courts.<sup>114</sup> To this extent, members of the Court use their offices to help effect changes in public policy beneficial to the state and consistent with the sound administration of justice.

#### G. *Role of the Judicial Assistants, Law Clerks, & Interns*

Because the justices' duties are so extensive, they could not possibly discharge their obligations without the help of a staff. Each justice accordingly is permitted to hire three staff members: a judicial assistant and two law clerks. The chief justice, with far greater responsibilities, is

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113. FLA. CONST. art. V, § 2(b).

114. *E.g., Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990).

permitted to have three law clerks, one of whom is called an executive assistant. The latter's responsibilities can include both legal research and some administrative functions. In addition, the chief justice's office has a permanent staff of judicial assistants, a staff attorney, and an internal auditor, all of whom remain attached to the office through different administrations. Finally, the staffs of the justices are usually supplemented three times a year by an internship program that brings law students into the Court to act as research aides.

### 1. Judicial Assistants

In Florida's judiciary, secretaries of judges are called judicial assistants. Their duties vary from office to office, but almost always include supervising the flow of paperwork, keeping files, overseeing the justices' schedules, and dealing with correspondence and telephone calls. Members of the public who call individual justices almost always deal with the judicial assistant first. Judicial assistants are hired by and serve at the pleasure of their respective justices.

### 2. Law Clerks

As noted above, the duties of law clerks also vary among the offices, but they are usually responsible for conducting legal research for their justices. Many also have the primary responsibility of drafting opinions for their justices after receiving guidance from a court conference vote. In this situation, law clerks typically are told the result and analysis that should be used in the proposed majority opinion, but are given primary responsibility for conducting research and writing an opinion for the assigned justice to review, revise, or edit.

Opinion writing is a responsibility that can be both time-consuming and labor-intensive.<sup>115</sup> Few justices would be able to manage their schedules unless at least some opinion writing was conducted by their staffs. Partly as a result, members of the Court have often chosen law clerks not merely based on academic performance in law school but also on proven writing

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115. As a result, law clerks, at a minimum, must have a law degree before the date they begin work. The Court previously required admission to The Florida Bar soon after law clerks began work, but this requirement was dropped as part of the job description in the mid-1980s. Justices, however, remain free to require Bar membership if they desire, and pay scales overwhelmingly favor those who have Bar membership. As a result, only rarely are law clerks not members of The Florida Bar.

ability, often demonstrated in prior professional careers.<sup>116</sup> The writing of legal opinions can be very exacting, if only because every majority opinion establishes legal precedent. Law clerks responsible for opinion writing, thus, must be able to master a style of English that is not merely formal, but very precise as well.

Because of this heavy responsibility, it is somewhat paradoxical that the common public image of law clerks is of young people freshly graduated from law school, with little real experience, who will leave to enter private practice after a year or two of clerking. At times the image has been borne out by reality. But the Florida Supreme Court throughout its history, and increasingly so today, has had a strong tendency to employ "permanent law clerks."<sup>117</sup> These most often are attorneys whose skills and temperaments especially suit the justices who employ them and who remain on staff indefinitely, at the pleasure of the justice. The vast majority of present justices have at one time or another employed such clerks.<sup>118</sup>

A number of factors have contributed to this tendency to keep "permanent law clerks." Perhaps the most significant is that the administrative and public responsibilities of the justices have so greatly increased in recent years that a poor choice of law clerks can be a serious liability. This has reinforced a tendency not to change staff once law clerks with demonstrable skills have been found. Another factor is that the legal job market that boomed in the 1980s has turned quite sour in the 1990s.<sup>119</sup> As a result, the competition for clerkships has increased drastically,<sup>120</sup> and those few hired as law clerks have a greater incentive to stay in their present jobs. Yet another factor is an increasing tendency among some young lawyers to steer away from the stress that can exist in private law firms.

116. Florida Supreme Court law clerks, for example, have included former journalists, former law professors, and former assistant prosecutors.

117. Law clerks are not permanent in the sense of having a job with civil service-style protections. Rather, these law clerks, at the request of their justices, agree to stay for some indefinite period beyond the two year minimum commitment typically required by each justice at the time the law clerk is hired.

118. Of the fifteen law clerks employed by justices in the summer of 1993, eight had been employed indefinitely. One of these eight had worked for the same justice for more than a decade, while four others had worked as law clerks in excess of five years each. Very long clerkships have not been uncommon. One former law clerk remained employed in that capacity for fourteen years before leaving to enter private practice.

119. In the mid-1980s, for example, it was common for nearly every Florida law student to have been hired for a job by the time of graduation. Now, it is common for half or more of a graduating law school class to still be looking for work after graduation.

120. Members of the court now receive applications from law students throughout the United States on a nearly continuous basis. Many are students with top credentials.

### 3. Interns

The Court also supplements its staff with student interns who work on an unpaid basis during each of the three semester periods common in law schools. Internships vary in length but usually commence each August, January, and May. By long-standing arrangement, the Court accepts its August and January interns only from students selected by the faculty of the Florida State University College of Law in Tallahassee and these students in turn are given academic credit for their work at the Court.

Internships starting in May are potentially available to students from any law school and may be more or less informal in nature.<sup>121</sup> These interns serve on a purely volunteer basis and are responsible for their own expenses. Academic credit is available only if the students can make the necessary arrangements with their law schools.

Summer internships have become commonplace at the Court almost by a process of unguided evolution. They began sporadically and informally with a handful of students whose colleges would give them academic credit for summer work with government agencies. Now, summer internships have become a routine dominated by students who, despite good academic qualifications, have been squeezed out of paying summer jobs by the tight market of the 1990s.<sup>122</sup> Many law school placement officers are encouraging students to take volunteer summer jobs to gain experience rather than do nothing. This has resulted in greater demand for volunteer summer internships by well—qualified students. In response, the Court has gradually expanded the number of interns it takes each summer.

Job responsibilities of interns vary among the offices, but usually involve assisting the law clerks. Many offices have a structured program in which student interns are given increasingly more responsibility as they demonstrate aptitude. Very promising students may even be assigned to write a simple majority opinion under the close supervision of the assigned law clerk and the justice. Much of an intern's work, however, consists of

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121. Application is usually accomplished by the student sending in a cover letter, resume, and writing sample to a justice at the court, in late winter or early spring, prior to the summer in question. Standards for these internships vary from office to office, as do the number of interns that will be accepted. Some offices take only one intern, while others take two or three.

122. In the mid-1980s, for example, it was very common for students to be employed as summer associates in law firms. Top students could often earn thousands of dollars in a single summer and even mediocre students could earn respectable salaries. As the market for legal services has soured, many law firms have been forced to sharply curtail or even to eliminate their summer associate programs.

more routine matters such as writing memoranda to the justice on petitions for jurisdiction, photocopying research material identified by law clerks, and writing memoranda to the law clerks on legal issues.

Perhaps the most valuable aspect of the Court's internship program is an insight into the Court's operation and an opportunity to work with a justice of the state's highest tribunal. An internship can be a strong credential. Moreover, a very significant number of former interns have gone on to find jobs as law clerks at the Florida Supreme Court or in other courts. Therefore, an internship can be an important stepping stone for a student interested in working as a law clerk after graduation. It is also a way in which the Court assists in educating succeeding generations of lawyers.

#### H. *Ethical Constraints on the Justices & Their Staffs*

The public, and even some members of the legal profession, do not fully appreciate the ethical constraints imposed upon judges and their staffs, including interns. Justices at the Court frequently receive letters from people asking that particular cases be decided certain ways or that judges should correct some perceived oversight in a case. On occasion, news reporters have even contacted judicial assistants or law clerks in an effort to learn the inside story about particular cases. Members of the public are sometimes offended when queries of this type go unanswered. However, the Court and its staff live under a very rigorous code of ethics that forbids them to comment in many instances.

##### 1. Constraints on Justices

Perhaps the most common misunderstanding, especially among the lay public, is a widespread belief that judges or justices can be approached about their official duties in much the same way a governor, a legislator, or their respective employees can. However, the Constitution<sup>123</sup> and ethics codes<sup>124</sup> absolutely require that judges be and appear to be impartial. For that reason, judges and justices are not permitted to publicly discuss any aspect of pending or impending cases<sup>125</sup> and there are even restrictions regarding cases that have become final.<sup>126</sup>

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123. U.S. CONST. amend. XIV; FLA. CONST. art. I, § 9.

124. FLA. CODE OF JUD. CONDUCT Canons 2, 3 (West 1993).

125. *Id.* at 3A.(6).

126. These include, for example, the fact that matters were discussed at Court conference, the content of unpublished draft opinions, and the Court's initial vote or changes



In an effort to maintain the public image of impartiality, judges and justices are also required to maintain a broad detachment from politics. In a recent case, for example, the Florida Supreme Court determined that a judge or justice may be reprimanded for writing public endorsement letters of a candidate in a nonpartisan judicial election.<sup>127</sup> This conclusion was based on an ethics rule generally prohibiting a judge or justice from lending the prestige of the office to any political cause.<sup>128</sup> As a result, judges and justices are required to refrain from participation in most types of political activities beyond those necessary for their own judicial elections.

Even the personal finances of judges and justices are closely regulated. For example, they are not permitted to be involved in any business transactions that might reflect poorly on their impartiality or job performance.<sup>129</sup> They are required to divest themselves of investments that result in their frequent recusal in cases before the Court, such as where a judge or justice owns stock in a corporation that is a frequent litigant.<sup>130</sup> Gifts, loans, and favors are closely regulated<sup>131</sup> and some restrictions even apply to the finances of a judge or justice's family and household members.<sup>132</sup> Judges and justices must also file disclosures of their income, assets, and business interests.<sup>133</sup>

A battery of other ethical constraints imposed upon judges and justices are set out in considerable detail in the *Code of Judicial Conduct*. Moreover, the level of detail may be expanded by a revision of the Code still pending review at the time this article was being written. The revision focuses on restrictions on the political activities in which judges may participate.

Enforcing ethical constraints on justices of the Florida Supreme Court poses a unique problem because, in theory, the Court is the final arbiter of what is ethical and what is not.<sup>134</sup> As a result, the Florida Constitution has created special mechanisms to deal with alleged impropriety by a jus-

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in votes prior to release of an opinion.

127. See *In re Inquiry Concerning a Judge*, Hugh S. Glickstein, 620 So. 2d 1000 (Fla. 1993); see also *In re Code of Judicial Conduct* (Canons 1, 2, and 7A(1)(b)), 603 So. 2d 494 (Fla. 1992).

128. FLA. CODE OF JUD. CONDUCT Canon 7 (West 1993).

129. *Id.* at 5C.(1).

130. *Id.* at 5C.(3).

131. *Id.* at 5C.(4).

132. *Id.* at 5C.(5).

133. FLA. CODE OF JUD. CONDUCT Canon 6B.(1) (West 1993).

134. The court itself promulgates the ethics rules. See FLA. CONST. art. V, § 2(a).

tice.<sup>135</sup> First, members of the Court are subject to inquiry by the Judicial Qualifications Commission ("JQC"), as are all Florida judges.<sup>136</sup> The JQC recommends proposed discipline for breaches of judicial ethics, subject to review by the Florida Supreme Court. However, when a justice of that court is being investigated, all sitting members of the Florida Supreme Court are automatically recused. Thereafter, the seven most senior chief judges of Florida's twenty judicial circuits automatically sit as temporary associate justices<sup>137</sup> to review the case and to impose discipline if appropriate. Discipline can include reprimand, suspension, or removal from office.<sup>138</sup>

Justices of the Court are also subject to impeachment and to removal by the Legislature. Grounds for impeachment are any misdemeanor in office as determined by a two-thirds vote of the State House of Representatives.<sup>139</sup> Once impeached, a justice is automatically suspended and the Governor can appoint a temporary replacement until completion of the trial.<sup>140</sup> Trial after impeachment occurs before the Florida Senate, and the justice being tried can be removed from office upon a two-thirds Senate vote. The Senate can also take the additional step of disqualifying the justice from holding any future Florida office,<sup>141</sup> though this requires an affirmative act and is not an automatic consequence of removal.<sup>142</sup>

The Florida Constitution specifies that the chief justice of the Florida Supreme Court must preside or choose another justice to preside over the Senate at all trials after impeachment.<sup>143</sup> Where the chief justice is under investigation, the Governor presides.<sup>144</sup> This mandatory language could lead to the problematic situation of a chief justice presiding over the trial of another justice. While the constitution is not entirely clear, it may be possible for the chief justice to appoint an impartial judge of a lower court as an associate justice solely for purposes of presiding over the Senate trial. Such an appointment would better ensure the impartiality of the presiding officer. In any event, a future revision of the Florida Constitution may be in order to address this problem.

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135. See FLA. CONST. art. V.

136. *Id.* § 12.

137. The significance of the term associate justice is discussed *infra* note 165 and accompanying text.

138. FLA. CONST. art. V, § 12(h).

139. *Id.* art. III, § 17(a); see also *Forbes v. Earle*, 298 So. 2d 1 (Fla. 1974).

140. FLA. CONST. art. III, § 17(b).

141. *Id.* § 17(c).

142. *Smith v. Brantley*, 400 So. 2d 443 (Fla. 1981).

143. FLA. CONST. art. III, § 17(c).

144. *Id.*

## 2. Constraints on Justices' Staffs

Judicial assistants, law clerks, and court interns are subject to much the same ethical constraints imposed on justices, at least with respect to official matters on which they work.<sup>145</sup> For their tenure on the staff, these persons are effectively a kind of alter ego of the justice when dealing with the Court's official business. As a result, they are subject to the canons of judicial ethics in a derivative sense, though the JQC obviously lacks jurisdiction over persons who are not judges. However, it deserves emphasis that this conclusion applies only to official matters, not to all activities of staff members *outside* the Court.

Prior to 1992, many persons assumed that judicial staff members were subject to all of the constraints imposed upon the justices, even for matters conducted on personal time.<sup>146</sup> In May 1992, the Florida Committee on Standards of Conduct Governing Judges reinforced this interpretation in an advisory opinion concluding that judicial assistants were prohibited from engaging in partisan political activities, just as judges and justices are.<sup>147</sup> The Committee's conclusions obviously implied that all judicial staff members were subject to the canons of judicial ethics as though they themselves were judges.

This view, however, was rejected by the Florida Supreme Court in a court conference in the fall of 1992. At that time, the Court took the unusual step of overruling<sup>148</sup> the advisory opinion and issuing its own statement on the question. This occurred after some of the judiciary's employees voiced objections to the Committee's reasoning.

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145. FLA. CODE OF JUD. CONDUCT Canon 3B.(2) (West 1993).

146. See Scott D. Makar, *Judicial Staff and Ethical Conduct*, FLA. B.J., Nov. 1992, at 10.

147. See Harvey L. Goldstein, Chairman, Committee on Standards of Conduct Governing Judges, Advisory Opinion 92-33 (Aug. 14, 1992).

148. The Court has traditionally used a somewhat unusual method of overruling advisory opinions of the Committee on Standards of Conduct Governing Judges. This is something that, in any event, is rarely done. If any member of the Court disagrees with the advisory opinion, the matter is discussed in a Court conference and a vote may be taken. If a majority of the Court agrees, a statement is prepared overruling the advisory opinion and that statement is then placed in the official minutes of the Court. At this time, the Clerk of the Court notifies the Committee chair of the Court's action and transmits a copy of the relevant portion of the minutes to *The Florida Bar News* for publication. The act of overruling the advisory opinion in this manner obviously does not constitute a decision of the Court and, for that reason, is not absolutely binding. But the Court's statement is highly persuasive and one from which the Court is unlikely to depart if discipline were attempted for some alleged ethical breach.

In its statement, the Court found that judicial staff members have a First Amendment right to engage in political activities provided this is done outside of Court, on personal time, and without reference to the judge or the judge's office.<sup>149</sup> In support of this conclusion, the Court said that members of a judge's staff are analogous to the spouses of judges, who have a right to engage in political activities using their personal time and resources.<sup>150</sup> This reasoning implies that staff members may be treated the same as a judge's spouse in other contexts involving the use of free time, though the analogy obviously is not a perfect one<sup>151</sup> and could be less forceful outside the context of exercising free-speech rights.

A special variety of ethical problems commonly arises with respect to law clerks. Some law clerks decide to enter private practice after completing two or more years of work at the Court, and some firms have voiced confusion over the ethical standards that govern the process of hiring a law clerk. Obviously, a problem could develop if the hiring firm has any case pending before the Court. Thus, law clerks should generally disclose any possible conflict of interest to their justices.

To assist in proper disclosure to the justice, at first contact or soon thereafter, the firm should probably disclose to the law clerk all of its cases pending for review in the Court or that are likely to be pending, before employment negotiations are concluded.<sup>152</sup> At that time, the law clerk should discuss the matter with the justice, who should then segregate the law clerk from the disclosed cases if there is any possibility or appearance of a conflict of interest. At a minimum, the law clerk may not personally or substantially work on any of the disclosed cases during the pendency of negotiations for employment with the firm. Furthermore, the law clerk may be segregated even after negotiations end or fail if the justice deems it necessary.<sup>153</sup>

Upon leaving the Court, former law clerks must be segregated from working on any case involving matters in which the law clerk participated personally and substantially, except upon consent by all parties after

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149. Florida Supreme Court Conference, Minutes of Meeting (Sept. 8, 1992) (on file with Court).

150. *Id.*

151. It is unlikely, for example, that the financial activities of a judge or justice's judicial assistant would create a substantial conflict of interest. The financial activities of the judge or justice's spouse could.

152. This should include any case in which the firm has an interest in its own right or as counsel to a party.

153. RULES REGULATING THE FLA. BAR 4-1.12(b).

disclosure.<sup>154</sup> A problem of this type might occur, for example, where the firm, after hiring the law clerk, acquires a client who had a case pending in the Court. Moreover, law clerks seldom can ethically reveal information learned at the Court, including the nature of their work assignments. Therefore, it would be wise for all involved parties to assume that the disqualification rule should apply to each of the firm's cases that were pending in the Court on the date of the law clerk's last employment there. In any event, if the former law clerk states that the disqualification rule applies in a particular case, the parties probably should not inquire as to the reasons why and former law clerks should not answer if asked.

Similar restrictions apply as to judicial assistants and interns, though problems are less frequent in this regard. Judicial assistants are fewer in number and do not change employment with the frequency more common for law clerks. Interns, meanwhile, are present at the Court for a few months at most and seldom are exposed to any but the most routine matters. However, both judicial assistants and interns should adhere to the rules applicable to law clerks if there is any possibility of a conflict of interest.

Interns, in particular, are routinely warned about conflicts that may be created by employment or negotiations for employment. For example, during their time at the Court, interns are not permitted to engage in part-time or volunteer work assisting anyone engaged in the practice of law. This is because all Court staff are prohibited from engaging in or providing support services for the practice of law, except in representing their own personal interests. Likewise, interns should disclose the fact that they are interviewing for jobs during their time at the Court and should not work on any matter in which their job prospects have an interest. Usually, the supervising law clerks regulate the interns' compliance with these ethical duties.

Enforcement of ethical constraints imposed on judicial staff differs from that used in the case of justices and judges. Ethical violations of a less serious nature typically are handled by the justice and can include reprimand or termination of employment. Serious violations also can result in contempt proceedings being brought, though only one such incident has occurred in the last few decades.<sup>155</sup> Any staff member who is an attorney is also subject to professional discipline by The Florida Bar, with penalties ranging from a private reprimand to disbarment. Student interns who plan to become licensed attorneys can be investigated for ethical breaches by The

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154. *Id.* at 4-1.12(a).

155. *See supra* note 40.

Florida Board of Bar Examiners, possibly resulting in a denial of licensure.<sup>156</sup>

### I. *Court Protocol*

In its day-to-day operations, the Florida Supreme Court has followed a simple protocol that sometimes borders on the informal. The unifying factor of the protocol, and perhaps its most formal aspect, is a seniority system in which more senior justices outrank their colleagues, with the sitting chief justice always deemed most senior.<sup>157</sup> If more than one justice is appointed to the Court simultaneously, seniority is determined by reference to the appointee's prior career using a standard adopted in 1968.<sup>158</sup> Virtually every other aspect of business in the Supreme Court

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156. The Florida Board of Bar Examiners routinely sends detailed questionnaires regarding former interns to the justices and their staffs. The questions probe such matters as the intern's thoroughness, promptness, work ethic, background, and personal problems. If the answer to any question raises a concern about fitness to practice law, the Bar Examiners will investigate further.

157. Except for the chief justice, seniority is determined according to the order of appointment to the court. Upon ceasing to be chief justice, members of the court revert to the seniority they otherwise would have had.

158. See The Fla. Supreme Court, minutes of meeting (Jan. 12, 1987) (on file with the Court). On October 14, 1968, the Florida Supreme Court adopted the following resolution:  
BE IT RESOLVED:

Seniority on this Court shall be determined by length of continuous service on this Court:

In the event more than one Justice assumes office on this Court at the same time, seniority of such Justices shall be determined in the following manner:

1. Former Justices of this Court;
2. Judges or former Judges of the District Courts of Appeal. Seniority of such District Court Judges shall be based upon the length of continuous service;
3. Judges or former Judges of the Circuit Court. Seniority of such Circuit Court Judges shall be based upon the length of continuous service;
4. Judges or former Judges of other courts of record of this State. Seniority of such Judges shall be based upon the length of continuous service;
5. Lawyer[s] without former judicial experience. Seniority of such lawyers shall be determined by length of time they have been admitted to The Florida Bar.

This Resolution shall become effective immediately.

This policy was reaffirmed on January 12, 1987, when two justices assumed office simultaneously. Because one of these justices had served on a district court, he was accorded a higher seniority than the other, who had served on a circuit court.

Building is governed by this seniority ranking.

Justices are listed according to seniority in court stationery, choose their office suites in the same order, and appear formally in public ranked from most senior to most junior. When the Court is in session the justices are seated with the chief justice presiding in the center, the next most senior justice placed to the immediate right, the next most senior justice placed to the immediate left, and so on until all are seated. Even the separate opinions attached to a majority opinion are ranked by reference to seniority.<sup>159</sup>

The seniority system also expresses itself in other ways. For example, a listing of justices in a publication should adhere to the system. However, formal public introductions reverse the seniority ranking on the premise that the most senior justices should be introduced last, giving them the "last word."<sup>160</sup>

Formal modes of addressing justices in writing have varied over time. However, in 1992, at the request of Allen Morris,<sup>161</sup> and through Justice Parker Lee McDonald, the Court established a few guidelines. The Court concluded that it would be appropriate in addressing correspondence to refer to the chief justice as "The Honorable (name), Chief Justice, Florida Supreme Court."<sup>162</sup> By analogy, letters addressed to other justices would be the same but with the word "Chief" omitted. The most common introductory salutation in a letter is "Dear Chief Justice (name)" or "Dear Justice (name)."

A member of the Court should not formally be called "Judge (name)." In the Florida judiciary, the title "Justice" is given exclusively to members of the Florida Supreme Court<sup>163</sup> because the constitution clearly distinguishes "justices" from "judges" sitting on the state's lower tribunals.<sup>164</sup> Contrary to the practice in the United States Supreme Court, the term "Associate Justice" is not a proper title for any sitting member of the Florida Supreme Court. The term is not used in the constitution. "Associate Justice" is the temporary title given to judges of a lower court assigned for

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159. As a general rule, separate opinions are divided into the six separate categories and, within each category, are then ranked according to the author's seniority.

160. ALLEN MORRIS, PRACTICAL PROTOCOL FOR FLORIDIANS (Revised) 77 (1988).

161. Clerk-Emeritus/Historian, Florida House of Representatives.

162. Letter from Justice Parker Lee McDonald, *Florida Supreme Court* to Allen Morris, Clerk-Emeritus/Historian, *Florida House of Representatives* (Nov. 2, 1992) (on file with author).

163. *Id.*

164. *See* FLA. CONST. art. V.

temporary service on the Florida Supreme Court.<sup>165</sup> Thus, the title should not be used in any context except when a judge is temporarily assigned to the Florida Supreme Court.

In less formal situations, or when addressing a justice verbally, the members of the Court usually are called simply "Justice (name)." For example, this has become the standard method of addressing a member of the Court during oral argument. In the late 1980s, the Court completely abandoned the use of the gender-specific titles "Madam Justice (name)" or "Mister Justice (name)" though a few attorneys still use these without incident.<sup>166</sup> The staff of the Florida Supreme Court commonly address a justice verbally with the single word "Judge," though this is an informal and familiar usage.

Justices who have retired from the Court commonly are addressed by the courtesy title "Justice," though this is not required and is subject to some ethical constraints. The courtesy title should not be used during the practice of law in which a former justice may be engaged except for purely biographical purposes. Nor should the title be used in any other context in which the title may create a false impression. The title "Chief Justice" can be used only with respect to a sitting chief justice of the Florida Supreme Court and is never used as a courtesy title.<sup>167</sup> Likewise, "Associate Justice" is never used as a courtesy title by lower court judges who previously have been temporarily assigned to sit on the Florida Supreme Court.

A few other matters of court protocol have been distilled into written form by Allen Morris, including details of the investiture ceremony for new justices<sup>168</sup> and protocol for funeral ceremonies of justices.<sup>169</sup> The Court generally has adhered to these two protocols. By tradition, the Court also

165. FLA. R. JUD. ADMIN. 2.030(g). Temporary assignments are made, for example, when a quorum of the court is not available. *Id.*

166. This change dates from the appointment of the first woman justice, Rosemary Barkett. Shortly after her appointment in 1985, Justice Barkett indicated she would not use the title "Madam Justice Barkett" but simply "Justice Barkett." Later, the other members of the Court dropped the "Mister" from their titles, and this change was formalized by altering all name plates on the justices' suites in the Supreme Court Building. The use of the unadorned title "justice" is consistent with the court's recently adopted policy of avoiding gender-specific language wherever possible. See Ricki Lewis Tannen, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990).

167. Letter from Justice Parker Lee McDonald, *Florida Supreme Court* to Allen Morris, Clerk-Emeritus/Historian, *Florida House of Representatives* (Nov. 2, 1992) (on file with author).

168. MORRIS, *supra* note 160, at 122-24.

169. *Id.* at 113-14.



generally has adhered to these two protocols. By tradition, the Court also lowers its flags to half—staff upon the death of any present or former justice.

### J. *The Clerk's Office*

The vast majority of the Florida Supreme Court's contact with lawyers and the public occurs through the Office of the Clerk of the Court.<sup>170</sup> Briefs are filed through the Clerk, and virtually all routine communications with lawyers are handled by this office. Yet, the Clerk's staff does far more than just deal with the public. The Clerk, who serves at the pleasure of the Court,<sup>171</sup> is charged with the responsibility of maintaining all papers, records, files, and the official seal of the Court.

Moreover, the Clerk's staff maintains the Court's docket,<sup>172</sup> oversees the rigorous procedural requirements imposed on death penalty cases,<sup>173</sup> arranges the exact timing of oral argument,<sup>174</sup> and prepares finalized opinions for release to the public.<sup>175</sup> Orchestrating routine functions such as these requires considerable coordination among the lawyers, the parties, and the Court. All such matters are handled by the Clerk's Office,<sup>176</sup> and the workload is substantial. In 1992, the Clerk's Office filed dispositions in 1890 cases and opened files in 1844 new cases, in addition to handling 314 motions for rehearing.

### K. *The Florida Supreme Court Library*

For its entire history, the Court has maintained its own law library, which consequently is the oldest state supported library in continuous operation in Florida. An 1845 catalog in the library's possession still lists the 260 volumes that comprised the Court's first collection in the year Florida was granted statehood. Today, the library maintains around 100,000

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170. The present Clerk is Sid White, and the Chief Deputy Clerk is Debbie Casseaux.

171. FLA. CONST. art. V, § 3(c).

172. Most docketing matters currently are controlled by Kathy Belton and Barbara Maxwell.

173. Most aspects of death penalty cases presently are supervised by Tanya Carroll.

174. The scheduling of oral argument is supervised by the Calendar Clerk, who presently is Sara Gainey.

175. The release of opinions is controlled by the Opinion Clerk, who presently is Janie Bentley.

176. Other members of the Clerk's staff who assist in these functions are Betsy Hill, who circulates court files, and Sonny McAllister, who moves materials between the Clerk's office and the justices.

volumes along with some 10,000 monograph titles, 1400 serial titles, and 700 linear feet of archival and manuscript material.<sup>177</sup>

But the library has not lost touch with its considerable history. A number of rare Florida legal books are in the Court's collection, including Spanish texts that were of great importance in the years after the Spanish Crown ceded Florida to the United States.<sup>178</sup> The library also still retains and uses a large number of antique glass-fronted "barrister" book cases that have belonged to the Court since they were first purchased in 1913. These Globe-Wernicke sectional bookcases filled five railroad cars when originally delivered, prompting a proud headline in the October 3, 1913, edition of a Tallahassee newspaper, the *Weekly True Democrat*.<sup>179</sup>

The office of the Supreme Court librarian<sup>180</sup> has existed only since 1957, and the occupant serves at the pleasure of the Court. Beginning in 1862, the Clerk also wore the hat of "head" librarian, though from 1899 until 1957 a full-time assistant librarian was employed. The library is open to the public, but it does not circulate books. Its hours of operation are 8:00 a.m. to 5:00 p.m., Monday through Friday, although the stacks are available to Florida Supreme Court justices and staff at any time.

#### L. *The Office of State Courts Administrator*

One of the newest internal components of the Court is the Office of State Courts Administrator, which was created on July 1, 1972. Its initial purpose was to assist the Court in the technical and fiscal problems associated with preparing the operating budget of the judicial branch, as well as compiling statistics on the need for new judges and specialized court divisions throughout Florida. Today, the State Courts Administrator<sup>181</sup> also serves as the Court's liaison to a number of other agencies, including the Legislature, the Governor, auxiliary court agencies, and national judicial agencies. The Office oversees a variety of legal programs and continuing

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177. Some of the information used here was compiled by former Supreme Court Librarian Brian Polley.

178. The treaty ceding Florida bound both the United States and the future state government to honor matters already finalized under Spanish law. Thus, a large number of early court cases actually rested on an interpretation of Spanish law. *Apalachicola Land & Dev. Co. v. McRae*, 98 So. 505, 524-25 (Fla. 1923).

179. See *Five Carloads of Book Cases for Tallahassee*, WEEKLY TRUE DEMOCRAT, October 3, 1913.

180. The present librarian is Joan Cannon. Her staff are Jo Dowling, Joyce Elder, Jo Smyly, and Linda Cole.

181. The present State Courts Administrator is Ken Palmer.

education for judges,<sup>182</sup> information systems used by the courts,<sup>183</sup> and the judicial branch's accounting and fiscal activities.

### M. *The Marshal*

The Court also appoints a Marshal<sup>184</sup> to be the custodian of the Supreme Court Building and grounds and to be the conservator of the peace in the building or any place where the Court is sitting. The Marshal is also authorized to execute the process of the Court throughout Florida. To this end, the Marshal is vested with constitutional authority to deputize the sheriff or a deputy sheriff in any Florida county.<sup>185</sup> The Marshal also is responsible for performing some court budgeting, purchasing and contracting, security, and property accountability and maintenance.

## III. AN OVERVIEW OF JURISDICTION

Another major aspect of the Court's day-to-day operations is the exercise of its jurisdiction.<sup>186</sup> It is through the exercise of jurisdiction that the Court chooses the cases that it will hear and thus, the kinds of issues that will be decided. Florida's society is shaped by these decisions because the opinions that result from the exercise of jurisdiction create the precedent that will control future cases. Moreover, the bulk of the Florida Supreme Court's jurisdiction is discretionary, meaning that the Court may decline to hear cases falling into particular categories even if it has jurisdiction over them.<sup>187</sup> Accordingly, the Court has significant power to choose the issues it deems most important.

The membership of the Court has been diverse enough that no particular ideology is discernible in the way jurisdiction has been exercised. Jurisdiction in discretionary cases, for example, usually is put to a vote by

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182. The present Deputy Administrator for Legal Affairs and Education is Dee Beranek.

183. The present Deputy Administrator for Information Systems and Program Support is Peggy Horvath.

184. The present Marshal is Wilson Barnes.

185. See FLA. CONST. art. V, § 3(c).

186. The historical development of the Florida Supreme Court's jurisdiction is amply discussed elsewhere. E.g., Arthur J. England, Jr. et al., *Florida Appellate Reform One Year Later*, 9 FLA. ST. U. L. REV. 221 (1981); Arthur J. England, Jr. et al., *Florida Appellate Reform*, 55 FLA. B.J. 704 (1981); Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 FLA. L. REV. 147 (1980).

187. See FLA. CONST. art. V, § 3(b)(3)-(6).

a panel of five justices, with four votes being necessary to grant review.<sup>188</sup> No single justice can dominate the choice of cases because of this procedure. Moreover, in some discretionary categories such as certified questions of great public importance,<sup>189</sup> the Court routinely grants jurisdiction in nearly every case brought for review by the parties.<sup>190</sup> This practice further mutes any ideological bias that might seek to influence the choice of cases.

### A. *The Nature of Jurisdiction*

Jurisdiction always involves a deceptively simple question: Does the Court have the power to hear and to determine the case?<sup>191</sup> In discretionary cases, a second question must also be addressed: Why should the case be heard?<sup>192</sup> Most of the time the answers are obvious. But there are a significant number of cases that fall somewhere near the outer limits of the Court's jurisdiction. These can be exceedingly complicated, and opinions addressing them often take on the quality of theological abstraction. Yet such cases are highly important in the law because they draw the line between what the Court will and will not hear. Much of the discussion below necessarily involves such cases; for that reason, the remainder of this article is of primary interest to lawyers and persons who may ask the Florida Supreme Court to hear their cases.

To further complicate the issue, the Court's jurisdiction is not really a single unified concept. Rather, jurisdiction falls into five distinct categories, each of which involves somewhat different problems. These categories are: advisory opinions, mandatory appellate jurisdiction, discretionary review jurisdiction, discretionary original jurisdiction, and exclusive jurisdic-

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188. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § 2(A)(1)(a). If review is granted, but four members do not agree on the need for oral argument, the chief justice decides the issue or places the matter on the court conference agenda for resolution. *Id.* If the jurisdictional vote is close and the case is significant, the chief justice also may send the petition to the remaining two justices for a jurisdictional vote by the entire court in lieu of placing the matter on the conference agenda.

189. *See infra* notes 462-85.

190. Occasionally parties choose not to bring such a case even though the district court has certified a question. The fact that a question is certified does not bind the parties to seek review in the Florida Supreme Court.

191. *See State ex rel. Campbell v. Chapman*, 1 So. 2d 278 (Fla. 1941).

192. *See generally* *The Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988) (holding that Florida Supreme Court has subject matter jurisdiction over appeal of decision of intermediate appellate court expressly citing a statute).

tion.<sup>193</sup> Each of these categories are addressed in detail below in separate sections of this article.

The exact nature of the Court's jurisdiction is not entirely uniform, but rather, can vary among the categories. The variations are too numerous to include in anything less than a treatise. However, the most important are: (1) the presumptions circumscribing the Court's jurisdiction; (2) the precedential value of decisions and opinions within each category; and (3) the limits placed on the Court's discretion.

### 1. Presumptions

The presumptions circumscribing jurisdiction depend on a key question: Is the Court's jurisdiction limited or plenary? In a broad but imperfect sense, the Florida Supreme Court is a tribunal of limited jurisdiction.<sup>194</sup> This means that the Court is forbidden to exercise any form of jurisdiction not expressly granted to it.<sup>195</sup> Unlike the circuit courts, the Florida Supreme Court does not have a general grant of plenary jurisdiction,<sup>196</sup> which would give the Court authority over any matter not expressly excluded from its jurisdiction.

This is an important distinction. It also is the reason why every well written opinion issued by the Florida Supreme Court begins with a statement establishing the basis of jurisdiction. The Florida Supreme Court cannot act until it finds, in the Florida Constitution, an express provision granting jurisdiction. The circuit court, to the contrary, is presumed to have jurisdiction unless the constitution or statutes say otherwise.<sup>197</sup> Put another way, the jurisdiction of the Florida Supreme Court, being limited, tends to be strictly construed. Unlike the supreme court, the jurisdiction of the circuit courts, being plenary, tends to be liberally construed.

Thus, in close cases, the presumptions would disfavor jurisdiction in a court of limited jurisdiction while favoring jurisdiction in a court of plenary jurisdiction. This has an important consequence. When parties invoke the jurisdiction of the Florida Supreme Court, they usually are fighting against a presumption that the Court cannot hear the case. For example, every petition seeking to establish jurisdiction based on an

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193. See FLA. CONST. art. V, § 3(b).

194. See *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200 (Fla. 1976); *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958).

195. See generally *Mystan Marine, Inc.*, 339 So. 2d at 201.

196. Compare FLA. CONST. art. V, § 3(b) with FLA. CONST. art. V, § 5(b).

197. See FLA. CONST. art. V, § 5(b).

“express and direct conflict of decisions”<sup>198</sup> labors under this presumption, and it is one reason the bulk of these petitions are summarily denied.

However, these limitations are not entirely uniform. The Court’s authority may verge on being plenary, at least within the context of certain types of cases. For example, the Court has mandatory exclusive appellate jurisdiction over every final judgment of a trial court imposing a sentence of death.<sup>199</sup> As a result, once the Court finds that a case involves the death penalty, the Court, as a practical matter, probably has a form of plenary jurisdiction in that case and the presumption would favor taking the case, even if there is doubt remaining about some jurisdictional nicety.<sup>200</sup> This is particularly true in light of the Court’s “all writs” jurisdiction, discussed more fully below.<sup>201</sup>

## 2. Precedential Value

Another factor that varies among the five categories is the precedential value of cases. Some types of opinions issued by the Court lack the dignity accorded others. This is especially true of advisory opinions, which, though they may be persuasive, do not establish precedent.<sup>202</sup> Opinions issued pursuant to the Court’s exclusive jurisdiction also may lack the binding effect of precedent, but only to the extent that they deal with the Court’s administrative and rule making functions. The Florida Supreme Court’s exclusive jurisdiction to regulate the bench and the bar is somewhat different. Court opinions disciplining judges and lawyers for improprieties may establish a kind of precedent. In practice, however, such cases are so fact-bound that the precedent may be limited.

## 3. Discretion

Two categories of discretionary jurisdiction, discretionary review jurisdiction and discretionary original jurisdiction, involve a separate problem: the concept of “discretion.”<sup>203</sup> Should the Court hear the case?

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198. See discussion *infra* part VI.D.

199. FLA. CONST. art. V, § 3(b)(1).

200. See *Tillman v. State*, 591 So. 2d 167 (Fla. 1991).

201. See discussion *infra* part VII.E.

202. E.g., *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

203. Discretion can be involved to a lesser extent in other categories of jurisdiction, but the restriction usually is so obvious as to merit little discussion. For example, the court has no discretion to refuse to hear a proper appeal pursuant to its mandatory jurisdiction. See FLA. CONST. art. V, § 3(b)(1), (2).

Discretion loosely implies the authority to make a decision as one sees fit, but the term has a somewhat different meaning in the present context. In *The Florida Star v. B.J.F.*,<sup>204</sup> the Court noted that even when a form of discretionary jurisdiction is established, the discretion of the Court to act is not always boundless. Discretion itself can be limited by the applicable law, forbidding the Court to act even though jurisdiction might exist over the case.<sup>205</sup>

Restrictions on discretion are most obvious when the Court's discretionary original jurisdiction is invoked to issue one of the so-called "extraordinary writs." The fact that a petitioner merely asks for mandamus, for example, vests the Court with jurisdiction. However, that is not the end of the matter. Well established law severely restricts the Court's discretion to issue writs of mandamus,<sup>206</sup> as is true of most of the extraordinary writs. Similar restrictions on discretion apply when a petitioner asks the Court to review a case decided by a district court of appeal that allegedly conflicts with an opinion of another Florida appellate court.<sup>207</sup> However, the Court's discretion is generally much broader over the other subcategories of discretionary review jurisdiction.

As a practical matter, lack of jurisdiction and lack of discretion equate to the same thing: The case will not be heard by the Court. This explains the tendency of lawyers and judges to blur the two concepts together, because the distinction usually does not matter. However, there is one very important consequence that justifies the distinction. In some cases, the deadline by which appeals must be taken to the United States Supreme Court hinges on whether the Florida Supreme Court actually had *jurisdiction* of a case in which it has denied review.

If the Court had jurisdiction but did not exercise discretion, for whatever reason, then the time to take the further appeal is judged from the date the petition was dismissed by the Florida Supreme Court.<sup>208</sup> But if the Court lacked jurisdiction entirely, then the time to take the further appeal is judged from the date the lower court's opinion became final.<sup>209</sup> This

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204. 530 So. 2d 286 (Fla. 1988).

205. *Id.*

206. See discussion *infra* part VII.A.

207. See discussion *infra* part VI.D.

208. *The Florida Star*, 530 So. 2d at 286.

209. *Id.* This problem sometimes has been addressed by saying that a court has "jurisdiction to determine jurisdiction." However, the Florida Supreme Court has avoided this type of analysis, which does not really solve the problem. If a court has jurisdiction to determine jurisdiction, then the decision not to hear a case could be construed as retroactively depriving the court of actual jurisdiction over the controversy.

is a crucial point for litigants seeking a further appeal to the United States Supreme Court. Thus, lawyers and litigants who hope to preserve all avenues of appeal must be mindful of the distinction between jurisdiction and discretion.

Finally, even when discretion is not limited by the law, the Court still can refuse to hear any case falling within a discretionary category.<sup>210</sup> Typically this occurs because the Court does not believe the case presents an important enough issue or the result was essentially just. For this reason, jurisdictional briefs should almost always argue why the case is significant enough to be heard. It is not enough merely to establish that jurisdiction exists and that discretion is unrestricted for present purposes, except perhaps where the importance of the case is obvious.

### B. *Invoking the Court's Jurisdiction*

The jurisdiction of the Florida Supreme Court usually must be invoked by an affirmative act of one of the parties to the cause. This can occur in several ways. Jurisdiction to issue an advisory opinion is invoked by the Governor or Attorney General by the mere filing of a letter with the Court outlining the issues.<sup>211</sup> In the mandatory appellate jurisdiction category, the Court's jurisdiction is automatic in death appeals,<sup>212</sup> and is invoked by notice of appeal and petition in the other subcategories. Discretionary review jurisdiction is invoked by filing a petition seeking review. However, in some types of cases, briefing on jurisdiction is not allowed.<sup>213</sup> Finally, the Court's exclusive original jurisdiction can be invoked by petition;<sup>214</sup> and in the case of the decennial review of legislative apportionment, the Attorney General must file the petition.<sup>215</sup>

By far, the largest single category of petitions for review allege that jurisdiction exists because the opinion under review conflicts with an opinion of another Florida appellate court. This category is discussed in greater detail below.<sup>216</sup>

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210. See FLA. CONST. art. V, § 3(b)(3)-(6).

211. See FLA. CONST. art. V, § 3(b)(10), art. IV, § 10.

212. FLA. CONST. art. V, § 3(b)(1).

213. See *infra* text accompanying notes 493-94.

214. The court also may exercise its exclusive original jurisdiction over rule-making and regulation of The Florida Bar on its own motion, but this is rarely done.

215. FLA. CONST. art. IV, § 10.

216. See discussion *infra* part VI.D.



## IV. ADVISORY OPINIONS

Any discussion of advisory opinions must begin with the well established rule that they are disfavored.<sup>217</sup> This rule hinges on the nature of advisory opinions. As a broad rule, an advisory opinion is any conclusion of law stated by a court in the absence of a real controversy as to that particular issue.<sup>218</sup> The reasons for this rule are obvious: Courts exist to resolve disputes, not to address questions in the abstract. Thus, the rule against advisory opinions prohibits parties from bringing a spurious lawsuit in order to create precedent. The rule equally forbids judges to invent new law irrelevant to the matters at hand.<sup>219</sup> In this sense, the rule is probably derived, in part, from the doctrine of separation of powers,<sup>220</sup> because the most extreme advisory opinions come close to being acts of judicial legislation.

However, the rule is subject to broad and sometimes poorly defined exceptions, partly because real world controversies often do not fall into the neat categories the rule might suggest. The true extent of controversies may be blurry. Moreover, judicial opinions must be conveyed through the inherently inexact medium of human language, and sometimes it is useful for judges to forecast directions the law is likely to take. Forecasting can give people throughout the state some degree of guidance on unresolved questions of law.

There is established precedent, for example, for judges to write what often are called "scholarly" opinions creating an entire analytic framework to resolve particular issues. Opinions of this type almost always go beyond the bare questions presented by the case and rest on thorough research and reasoning contained in the text. As recent cases from the United States Supreme Court have demonstrated, they often are admired, honored, and come in all ideological bents.<sup>221</sup> Thus, the rule against advisory opinions does not apply to scholarly opinions, though such opinions sometimes are criticized for violating the rule.

Florida law also has a long-standing tradition of *obiter dicta*, usually shortened to "dicta," which by definition are statements in a court's opinion

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217. See, e.g., *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993 (Fla. 1976); *Department of Admin. v. Home*, 325 So. 2d 405 (Fla. 1976).

218. See *Interlachen Lakes Estates, Inc.*, 341 So. 2d at 993.

219. See *id.*

220. See FLA. CONST. art. II, § 3.

221. E.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993).

that are extraneous or unnecessary to the resolution of the issues.<sup>222</sup> Scholarly opinions, almost by definition, are built on dicta. Moreover, dicta are so common in opinions that a well established body of cases govern their interpretation, and obviously, tolerate their continued use. Thus, dicta are extraneous statements of law that are permissible, though not always taken seriously. Here again, the rule against advisory opinions does not reach so far as to out-and-out prohibit the use of dicta.

In any event, dicta are subject to strong limitations. Courts sometimes say that dicta bind no one, not even the one who wrote them,<sup>223</sup> though this assertion may suggest too much. In actual practice, dicta can have persuasive force in much the same way that a concurring opinion can, at least when they are well reasoned.<sup>224</sup> This is most apparent in scholarly opinions. In other words, dicta should be considered if relevant, can be ignored if poorly reasoned or distinguishable, and gain greater force with repetition. One district court of appeal has even suggested that a dictum stated by the Florida Supreme Court "is not without value as precedent,"<sup>225</sup> but this may use the word "precedent" too loosely.

Whatever border separates dicta from advisory opinions has never been finely drawn, and there probably can be no bright line rule. Clearly, dicta can verge into an advisory opinion and thus, may be abused. In broad terms however, statements that illuminate or place in context any relevant issue probably should continue to be tolerated as a useful feature of opinion writing, especially in forecasting the law's evolution. The rule against advisory opinions would be most applicable to attempts to address wholly irrelevant issues, especially where the effect is legislation.

Even then, other long standing exceptions to the rule against advisory opinions exist. In a few instances, even moot or completely abstract questions can be answered by the Court. For example, the mootness doctrine generally requires dismissal of a cause in which the issues have become so fully resolved that any decision will have no actual effect.<sup>226</sup> There is, however, an important exception for moot cases that present important questions capable of repetition yet likely to evade review because they are inherently fleeting in nature. This occurred in the case of *T.A.C.P.*

222. *See Therrell v. Reilly*, 151 So. 305 (Fla. 1932).

223. *E.g.*, *Hart v. Stribling*, 6 So. 455 (Fla. 1889).

224. *See Milligan v. State*, 177 So. 2d 75 (Fla. 2d Dist. Ct. App. 1965); *but see Continental Assurance Co. v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986) (dicta never regarded as "ground-breaking precedent").

225. *Hart v. Stribling*, 6 So. 455 (Fla. 1889).

226. *Hollywood, Inc. v. Clark*, 15 So. 2d 175 (Fla. 1943).

discussed above.<sup>227</sup> If the Court finds this situation to exist, jurisdiction may be determined as though the controversy had never become moot.<sup>228</sup>

Likewise, the Florida Constitution itself expressly authorizes the Court to consider abstract questions of law and issue advisory opinions to the Governor and Attorney General in two narrow circumstances.<sup>229</sup> Like all advisory opinions, these opinions do not constitute binding precedent, though they can be persuasive.<sup>230</sup> They are authorized by the constitution to deal with situations in which the Court's opinion on an abstract question can advance public interests, discussed below.

### A. *Advisory Opinions Requested by the Governor*

The Florida Supreme Court may issue advisory opinions to the Governor on any question affecting the latter's constitutional powers and duties.<sup>231</sup> By tradition, the question or questions are posed in a simple letter to the Court on the Governor's stationery.<sup>232</sup> Often, the letter is quite detailed and usually contains an in—depth briefing on the relevant law, including reasons why the Governor believes the questions should be answered in a particular way.

Jurisdiction is mandatory; the Court must hear the case and issue an opinion.<sup>233</sup> Upon receipt, the letter is immediately routed to the chief justice, who will call a court conference to determine if the question can be answered and if oral argument is desired.<sup>234</sup> If the case is accepted, the chief justice then will assign it to an office.<sup>235</sup> In practice, oral argument is usually granted,<sup>236</sup> except where at least four justices determine that the question is unanswerable for reasons discussed below.<sup>237</sup> Any person whose substantial interest may be affected by the advisory opinion may be

227. See *supra* text accompanying note 28.

228. *In re T.A.C.P.*, 609 So. 2d 588, 589 n.2 (Fla. 1992) (citing *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984)).

229. FLA. CONST. art. IV, §§ 1(c), 10.

230. See *Florida League of Cities*, 607 So. 2d at 399.

231. See FLA. CONST. art. IV, § 1(c).

232. This is consistent with the applicable Rule of Court, which only requires that the Governor's request be in writing. See FLA. R. APP. P. 9.500(a).

233. *Id.*

234. See SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(G)(1).

235. *Id.* Advisory opinions almost always fall into the "special" category of case assignments. See *supra* text accompanying note 73.

236. See *supra* text accompanying notes 70-73.

237. FLA. R. APP. P. 9.500(b)(1).

permitted to make argument, to file a brief, or both.<sup>238</sup> Time limitations and scheduling of argument lie within the Court's discretion.<sup>239</sup>

An opinion is then issued on an expedited basis after argument can be heard, subject to one exception: The constitution provides that the opinion must be rendered "not earlier than ten days from the filing and docketing of the request, unless in [the Court's] judgment the delay would cause public injury."<sup>240</sup> The opinion also is written in the form of a letter addressed to the Governor and signed by the concurring justices, although the letter will be published like any other court opinion and included in West Publishing Company's Southern Second series. Any separate concurring or dissenting views are written in the form of a separate letter to the Governor signed by the justices agreeing with that particular viewpoint, and are appended to the majority's letter.

Under the constitution's requirements, in the strictest sense, the Court's discretion to answer a request for an advisory opinion is confined solely to questions of the Governor's constitutional powers.<sup>241</sup> Accordingly, the first issue that must be addressed in each instance is whether the Governor's questions can be answered as framed. If the questions stray beyond constitutional concerns, then the Court lacks discretion and must refuse to answer. There is precedent that an advisory opinion cannot address issues of the Governor's purely statutory powers.<sup>242</sup>

Over the years, however, the distinction between constitutional and statutory concerns has become fuzzy. In a number of cases the Court's majority has answered questions about statutory matters if there was some significant and identifiable nexus with the Governor's constitutional powers or duties. For example, the Court has held that the Governor's constitutional powers are implicated by questions posed to the Court about new statutory tax schemes. This was done on grounds that the fiscal stability of the state was at stake, which implicated the Governor's fiscal duties under the Florida Constitution.<sup>243</sup>

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238. FLA. R. APP. P. 9.500(b)(2); SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(G)(1).

239. FLA. R. APP. P. 9.500(b)(2).

240. FLA. CONST. art. IV, § 1(c).

241. *Id.*

242. *See In re Advisory Opinion to the Governor*, 225 So. 2d 512 (Fla. 1969).

243. *See In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 (Fla. 1987) (citing *In re Advisory Opinion to the Governor*, 243 So. 2d 573, 576 (Fla. 1971)).

A similar result was reached in a case involving a statute modifying Florida's appellate districts and creating judicial vacancies.<sup>244</sup> There, the Court found discretion to hear the case because "irreparable harm" otherwise might result, and the constitutional nexus cited was the Governor's duty to fill judicial vacancies.<sup>245</sup> Thus, in actual practice, the Court sometimes may find it has discretion to answer questions about statutes significantly related to any one of the Governor's express constitutional powers or duties.

"Statutory" advisory opinions of this type, even if proper, are not without problems. There are important limitations to advisory opinions to the Governor beyond the fact that they are not technically binding precedent. The Court has held that advisory opinions cannot address federal issues. The Court has also held that they can address Florida constitutional issues only for *prima facie* validity.<sup>246</sup> As a result, all federal questions remain unresolved along with any challenge to the statute's constitutionality as applied to specific individuals.<sup>247</sup> A dissenting justice in one of the tax cases suggested that an advisory opinion of this type can win the Governor, at best, a fragment of a victory.<sup>248</sup>

Advisory opinions to the Governor, in other words, are most useful when they are confined to the stricter parameters suggested by the Florida Constitution itself: the Governor's constitutional powers and duties. The Florida Supreme Court is the final authority on the meaning of the state constitution, subject to the people's power of amendment.<sup>249</sup> Advisory opinions confined to a question of pure Florida constitutional law are thus far more persuasive than ones that delve into the validity of statutes or into matters regulated by federal law. A "constitutional" advisory opinion genuinely may be able to resolve a future controversy before it can occur, but a "statutory" advisory opinion may only mark the first of many rounds of litigation.

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244. *In re Advisory Opinion to the Governor Request of June 29, 1979*, 374 So. 2d 959 (Fla. 1979).

245. *Id.* at 962.

246. *In re Advisory Opinion to the Governor*, 509 So. 2d at 301-02.

247. This restriction is self-evident. Advisory opinions deal with abstract questions of law, not the concerns of single individuals not present in the court. "As applied" challenges, by their very nature, require a controversy raised by individuals. *See id.*

248. *Id.* at 319-20 (Barkett, J., declining to answer questions).

249. *See The Florida Star*, 530 So. 2d at 288; *see also* FLA. CONST. art. XI, § 3.

## B. *Advisory Opinions Requested by the Attorney General*

The second type of advisory opinion authorized by the constitution are requested by the Attorney General. Cases of this type are confined solely to the question of whether a citizen's petition to amend the state constitution is valid.<sup>250</sup> This particular type of jurisdiction is of recent vintage.<sup>251</sup> It was added to the constitution by the people of Florida to lessen the possibility that citizens might expend considerable time and resources on a petition drive later declared invalid on technical grounds. Previously, there was no way for drive members to obtain an advance court ruling on the validity of their petition.

Such a ruling is important because citizen petition drives are subject to two requirements imposed by state law. The proposed amendment must contain only a single subject<sup>252</sup> and must include a fair and accurate ballot summary of no more than seventy-five words.<sup>253</sup> The Florida Supreme Court has determined that it cannot consider any issue beyond these two, including whether the amendment, if enacted, would violate the United States Constitution.<sup>254</sup> Nor can the Court rewrite an unfair or inaccurate ballot summary.<sup>255</sup> However, these are restrictions imposed not by the constitution, but by the enabling legislation, which could be amended to lift the restrictions. A bill to accomplish just that was approved by the 1993 Florida Legislature but vetoed by the Governor.<sup>256</sup>

An action requesting an advisory opinion of this type is commenced by the Attorney General, who is required by law to petition the Court once

250. See FLA. CONST. art. IV, § 10; see also *id.* art V, § 3(b)(10).

251. The relevant constitutional amendment creating this form of jurisdiction was adopted by the voters of Florida on November 4, 1986, and enabling legislation was approved the following year.

252. See FLA. CONST. art. XI, § 3.

253. See FLA. STAT. § 101.161 (1991).

254. See *Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991). In early 1994, a case was pending before the Florida Supreme Court in which several parties argued that advisory opinions to the attorney general may properly address federal constitutional questions. *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination*, No. 82,674 (Fla. argued January 7, 1994). In effect, these petitions asked the Court to recede from its earlier decision that the constitutional issues are not justiciable. *Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices*, 592 So. 2d at 227. At the time this article was being finalized, no decision had yet been rendered on these petitions.

255. *Smith v. American Air Lines, Inc.*, 606 So. 2d 618, 621-22 (Fla. 1992).

256. See Fla. HB 195 (1993); Fla. SB 1278 (1993).

certain threshold requirements are met.<sup>257</sup> The enabling legislation provides that members of the citizen petition drive must register as a political committee; must submit the ballot title, substance, and text to the Secretary of State; and must obtain a letter from the state Division of Elections that a certain number of verified signatures have been obtained on the petition.<sup>258</sup> At this juncture, the Secretary of State must submit the petition to the Attorney General,<sup>259</sup> who is required to petition the Court within thirty days.<sup>260</sup>

The Court has determined that advisory opinions of this type are handled the same as those requested by the Governor.<sup>261</sup> By analogy to gubernatorial advisory opinions, the Attorney General has adopted the practice of submitting the case to the Court by means of a letter on official stationery addressed to the justices.<sup>262</sup> The two relevant questions must be posed and answered, because neither the Attorney General nor the Court has any discretion to expand or to restrict the issues, as matters presently stand.

Beyond that, the Attorney General is not required to brief the issue nor to take any particular side in the case. However, the Attorney General's letter usually includes a statement outlining the facts, issues, and relevant law in an objective manner, without advocating any particular result. Any interested party may also brief the case, which usually is scheduled for oral argument. There has been no need to expedite such cases, because the enabling legislation ensures that they come well in advance of any election.

Although jurisdiction over cases of this type is recent, the Court nevertheless decides these cases by drawing on precedent. Previously, challenges to proposed constitutional amendments could be brought by means of a mandamus action filed at any time prior to the date of the election.<sup>263</sup> The Court has concluded that its new advisory jurisdiction is meant to address the same issues previously considered by way of mandamus, subject to the inherent limitations of advisory opinions.<sup>264</sup>

257. FLA. CONST. art. IV, § 10.

258. FLA. STAT. § 15.21 (1991). The number required is determined by a formula contained in this statute. *Id.*

259. *Id.*

260. FLA. STAT. § 16.061 (1991).

261. SUP. CT. MANUAL OF INTERNAL OPERATING PROCEDURES § II(G)(2).

262. *See In re Advisory Opinion to the Attorney General English—the Official Language of Florida*, 520 So. 2d 11, 12 (Fla. 1988) (noting case was submitted by letter).

263. *See Florida League of Cities*, 607 So. 2d at 397.

264. *Id.* at 399.

Thus, earlier cases brought as mandamus actions are relevant in determining the applicable law. However, the fact that this new form of jurisdiction is only advisory means that any opinion issued by the Court is highly persuasive but not binding. The Court still can entertain a later petition for mandamus provided that it does not attempt to relitigate issues already addressed in the advisory opinion.<sup>265</sup>

The standard for addressing the “single-subject” requirement wavered during the early 1980’s but has become more stable recently. All that is required is that the proposed amendment have a logical and natural oneness of purpose, which occurs if all parts of the amendment may be viewed as having a natural relation and connection as components or aspects of a single dominant plan or scheme.<sup>266</sup> The Court also has held that it is not necessarily relevant that the proposed amendment affects more than one provision of the Florida Constitution or more than one branch of government provided it meets the “oneness” standard.<sup>267</sup> This test has been criticized for its subjectivity but remains the applicable standard of review.<sup>268</sup>

The standard for addressing the ballot summary issue has a more stable history. The Court has consistently held that the summary must state in clear and unambiguous language the chief purpose of the measure, but need not explain every detail or ramification.<sup>269</sup> The chief evil addressed by this standard of review is to prevent the voters from being misled and to allow votes to be cast intelligently.<sup>270</sup> For example, the Court has held ballot summaries defective for suggesting that new rights were to be given to the people, when in fact rights were being taken away.<sup>271</sup> Moreover, the failure to include an adequate ballot summary cannot be cured by the fact that public information about the amendment was widely available.<sup>272</sup>

For reasons not entirely clear, the Court has not adopted the practice of answering the Attorney General’s questions in the form of a letter signed by the concurring justices, as happens with gubernatorial advisory opinions.

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265. *Id.* at 398-99.

266. Advisory Opinion to the Attorney General—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991) (quoting *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)).

267. *Id.* (citing *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976)).

268. *Id.* at 231 (Kogan, J., concurring in part, dissenting in part).

269. *Id.* at 228 (quoting *Carroll v. Firestone*, 497 So. 2d 1204, 1204-1206 (Fla. 1986)).

270. *Id.*

271. *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *accord* *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991).

272. *Wadhams v. Board of County Comm’rs*, 567 So. 2d 414, 416-17 (Fla. 1990).



Instead, the Court has issued its conclusions in the form of an opinion, possibly because this always was done in the earlier mandamus actions. However, the letter format has the grace of emphasizing the advisory nature of the opinion and the fact that the opinion comes from the justices as individuals and not from the Court as a tribunal. The Court, at some point, might wish to return to the letter format. In any event, this is a matter of sheer form and does not alter the purely advisory nature of the opinion.<sup>273</sup>

## V. MANDATORY APPELLATE JURISDICTION

The Florida Supreme Court is vested with mandatory appellate jurisdiction over four narrow categories of cases. These are: (1) death appeals;<sup>274</sup> (2) appeals involving the validity of public-revenue bonds;<sup>275</sup> (3) appeals from the Florida Public Service Commission;<sup>276</sup> and (4) appeals from opinions of a district court declaring a state statute or provision of the Florida Constitution invalid.<sup>277</sup> Jurisdiction in the first three subcategories is exclusive, meaning that no other appellate court can hear the case.<sup>278</sup> All cases brought under the Court's mandatory jurisdiction are called "appeals," as distinguished from "reviews."<sup>279</sup>

The reasons for vesting the Court with some limited forms of mandatory, exclusive appellate jurisdiction are evident. In death appeals, for example, the Court has noted that its mandatory appellate jurisdiction rests in part on the need to ensure uniformity of the applicable law throughout Florida.<sup>280</sup> A lack of uniformity might occur if the various district courts of appeal had jurisdiction subject only to discretionary review in the Florida Supreme Court.<sup>281</sup> Uniformity is essential in death cases because of a variety of federal constitutional restrictions.

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273. See *Smith*, 607 So. 2d at 399.

274. FLA. CONST. art. V, § 3(b)(1).

275. *Id.*, § 3(b)(2).

276. *Id.*

277. *Id.* § 3(b).

278. *Id.*

279. See FLA. CONST. art. V, § 3(b)(1) (using terms "appeal" and "review" in contradistinction). The distinction apparently has a long history in Florida, where Courts sometimes have said that the word "appeal" denotes an appellate proceeding that may be had as a matter of right. See *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961).

280. *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991).

281. *Id.*

The same reasoning applies to bond validations and appeals to the Public Service Commission. Enormous amounts of public money and great potential liability often are at stake in these cases. A determination by the state's highest court is necessary to dispel questions as to whether publicly issued bonds are valid and whether utility regulations and rates are lawful. Without such finality, bonds might be considered a poor risk by investors who might suddenly be cast in doubt by new Court decisions; and, utility services might be impeded by protracted appellate litigation or unresolved doubts in the law. Thus, the framers of the constitution vested the Florida Supreme Court with mandatory appellate jurisdiction to resolve these matters.<sup>282</sup>

### A. *Death Appeals*

The Court's authority over death appeals is one of the most straightforward. Very simply, the Court has exclusive, mandatory jurisdiction over any final judgment imposing a sentence of death<sup>283</sup> and all other matters arising from the same trial and sentencing.<sup>284</sup> Moreover, jurisdiction is automatic, meaning the Court must hear the case even if the inmate sentenced to death does not wish to appeal.<sup>285</sup> This is the only type of supreme court jurisdiction that is automatic. In all others, failure to bring an appeal or seek review deprives the Court of jurisdiction.<sup>286</sup> A murder conviction resulting in any penalty less than death is appealed to the appropriate district court, with possible discretionary review later in the Florida Supreme Court.

The rare disputes over this form of jurisdiction often relate to the collateral proceedings that almost always follow the conclusion of the appeal. Nevertheless, the Court commonly cites its constitutional jurisdiction over death appeals as a basis for hearing collateral challenges,<sup>287</sup> even though the latter technically do not constitute "appeals" at all. This suggests the plenary nature of the jurisdiction granted once the Court finds there is

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282. See FLA. CONST. art. V, § 3(b)(1), (2).

283. *Id.*, § 3(b)(1).

284. See *Savoie v. State*, 422 So. 2d 308 (Fla. 1982).

285. *Muehlman v. State*, 503 So. 2d 310, 312-13 (Fla.), *cert. denied*, 484 U.S. 882 (1987) (citing FLA. STAT. § 921.141(4) (1985)).

286. There are limited but rare exceptions when the Court exercises its administrative jurisdiction *sua sponte* to make rules and regulate the Florida Bar. Moreover, administrative acts of the court are not judicial acts, properly speaking.

287. *E.g.*, *Johnson v. Singletary*, 612 So. 2d 575, 576 (Fla. 1993), *cert. denied*, 113 S. Ct. 2049 (1993).

a final judgment of death in the case, a conclusion reinforced by the Court's habeas corpus<sup>288</sup> and "all writs" jurisdiction.<sup>289</sup>

Interlocutory appeals in ongoing trials that might result in a death penalty are more problematic, and the law in this area remains unsettled. The argument against the Court hearing these cases rests chiefly on the fact that the constitution grants jurisdiction only where there is a final judgment imposing the death penalty.<sup>290</sup> Moreover, in 1979, the Court stated that there is no reason interlocutory appeals in death cases should not go to a district court of appeal when they involve matters routinely reviewed there, as most do.<sup>291</sup> The Court's 1979 analysis of this issue came prior to the jurisdictional reforms of 1980 and can be questioned on that basis, but the rationale remains sound.

Nevertheless, the argument against interlocutory jurisdiction cannot be called compelling as matters now stand. In 1988, the Court appeared to hold that interlocutory appeals to a district court in a death case become "law of the case" perhaps even when no further appeal to the Florida Supreme Court was possible at the time.<sup>292</sup> This suggestion contradicted, and thus may have overruled, a 1984 holding saying the opposite.<sup>293</sup> The possible result is that the Florida Supreme Court could be deprived of its ability to consider an interlocutory issue that very well might reflect on the validity of a later death sentence; a result obviously contrary to the principle of automatic and full review in death cases.<sup>294</sup> Defense counsel also might deprive the client of a full appeal in the Florida Supreme Court simply by exercising the right to an interlocutory appeal to the district court.

The only reasonable solutions to this problem are to recognize some form of obligatory supreme court jurisdiction in interlocutory appeals or to hold, once again, that the law of the case doctrine does not apply in this context. Obligatory jurisdiction could be premised on the Court's jurisdiction over judgments of death or its all writs power.<sup>295</sup> However, either of these approaches strains the constitution's language and risks burdening the Florida Supreme Court's docket with interlocutory appeals from cases that

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288. See discussion *infra* part VII.D.

289. See discussion *infra* part VII.E.

290. See FLA. CONST. art. V, § 3(b)(1).

291. *State v. Preston*, 376 So. 2d 3, 4 (Fla. 1979).

292. *LeCroy v. State*, 533 So. 2d 750, 754 (Fla. 1988), *cert. denied*, 492 U.S. 925 (1989). *But see* *Preston v. State*, 444 So. 2d 939, 942 (Fla. 1984).

293. *Preston*, 444 So. 2d at 942.

294. See *id.*

295. See discussion *infra* part VII.E.

may or may not result in a death penalty. Limiting the law of the case doctrine seems more consistent both with the pre-1988 case law<sup>296</sup> and the language of the constitution itself. Supreme Court jurisdiction requires a final judgment of death, not mere speculation that such a judgment will be entered.<sup>297</sup> Moreover, interlocutory appeals in death cases rarely involve matters the district courts do not routinely consider.

There is a separate method by which non-final orders of trial courts sometimes are directly reviewed by the Florida Supreme Court. On rare occasions the Court has agreed to review such matters by way of writ of prohibition.<sup>298</sup> However, these cases involve the trial court's effort to restrict prosecutorial discretion to seek the death penalty. It is highly unlikely that prohibition would be allowed over more routine issues.

### B. Bond Validation

The second form of mandatory, exclusive appellate jurisdiction deals with the validation of bond issues made for some public purposes. Typically, the bonds are issued by governmental units to build infrastructure, to finance public projects, or to advance the public welfare. This is a type of jurisdiction authorized by the constitution but requiring enabling legislation,<sup>299</sup> that has now been enacted.<sup>300</sup>

The jurisdictional grant is narrow. The Court has said that its sole function in such cases is to determine whether the governmental agency issuing the bonds had the power to act as it did, and whether the agency exercised its power in accordance with the law.<sup>301</sup> Some procedural time limits are abbreviated in bond cases to allow expedited review.<sup>302</sup>

The determination of legality can include questions that might impugn the bond issue, such as the propriety of an election in which voters approved a funding source securing the issue.<sup>303</sup> Moreover, many types of bonds

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296. See *supra* note 293.

297. See FLA. CONST. art. V, § 3(b)(1).

298. *E.g.*, State v. Donner, 500 So. 2d 532 (Fla. 1987); State v. Bloom, 497 So. 2d 2 (Fla. 1986). The writ of prohibition is discussed *infra* part VII.C.

299. See FLA. CONST. art. V, § 3(b)(2).

300. FLA. STAT. § 75.08 (1991).

301. State v. Leon County, 400 So. 2d 949, 950 (Fla. 1981).

302. FLA. R. APP. P. 9.110(1)(i); *id.* 9.330(c).

303. People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373 (Fla. 1991).

are proper only if issued for public, municipal, or other specific purposes.<sup>304</sup> But these restrictions are sometimes broadly construed. "Public purpose," for instance, has been found to include even some projects of primary benefit to relatively small segments of the public<sup>305</sup> or even private enterprise.<sup>306</sup> The most famous of these cases involved the validation of bonds for reclamation and water control in the vicinity of Walt Disney World.<sup>307</sup>

### C. Public Service Commission Appeals

The third form of mandatory, exclusive jurisdiction governs appeals from orders of the Florida Public Service Commission affecting rates or services of electric, gas, or telephone utilities.<sup>308</sup> Jurisdiction requires enabling legislation, which has been enacted.<sup>309</sup> It deserves emphasis that the orders under appeal must relate to rates or services.<sup>310</sup> Other types of issues often arise in Public Service Commission cases and, therefore, do not fall within the Florida Supreme Court's exclusive jurisdiction.<sup>311</sup>

The enabling legislation adds only a few insights into the Court's jurisdiction. For instance, it specifies that appeal is obtained "upon petition."<sup>312</sup> Additionally, one statute equates the term "telephone service"<sup>313</sup> with "telecommunications company,"<sup>314</sup> thus defining the Florida Supreme Court's jurisdiction to reach most forms of two-way communication for hire within the state.<sup>315</sup> There appear to be no cases addressing

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304. *E.g.*, *State v. City of Orlando*, 576 So. 2d 1315, 1316-18 (Fla. 1991), *receding from* *State v. City of Panama City Beach*, 529 So. 2d 250 (Fla. 1988); *see* FLA. CONST. art. VII, §§ 2, 10-17; FLA. STAT. § 75.01-75.17 (1991).

305. *Northern Palm Beach County Water Control District v. State*, 604 So. 2d 440 (Fla. 1992).

306. *E.g.*, *Linscott v. Orange County Indus. Dev. Auth.*, 443 So. 2d 97 (Fla. 1983); *State v. Osceola County Indus. Dev. Auth.*, 424 So. 2d 739 (Fla. 1982).

307. *State v. Reedy Creek Improvement Dist.*, 216 So. 2d 202 (Fla. 1968) (case arose prior to adoption of the 1968 Constitution).

308. *See* FLA. CONST. art. V, § 3(b)(2).

309. FLA. STAT. §§ 364.381, 366.10 (1991).

310. *See id.* § 364.381.

311. *E.g.*, *State v. Lindahl*, 613 So. 2d 63 (Fla. 2d Dist. Ct. App. 1993). For a discussion of jurisdiction in other types of cases, *see* Arthur J. England, Jr., et al., *Florida Appellate Reform One Year Later*, 9 FLA. ST. U. L. REV. 221, 230 (1981).

312. FLA. STAT. § 366.10 (1991).

313. *See* FLA. CONST. art. V, § 3(b)(2).

314. FLA. STAT. § 364.381 (1991).

315. *See id.* § 364.02(7).

whether this statutory definition comports with the strict language of the constitution, which only uses the word “telephone.”<sup>316</sup>

#### D. *Statutory/Constitutional Invalidity*

The final form of mandatory jurisdiction differs from the other three because it is not exclusive. By definition, cases involving statutory or constitutional invalidity are appealed from a district court decision that has stricken a provision of the Florida Statutes or state constitution.<sup>317</sup> The plain language of the constitution requires that this decision must actually and expressly hold the statutory or constitutional provision invalid.<sup>318</sup> Apparently, it is not enough that the opinion can merely be construed to have reached the same result tacitly.<sup>319</sup> However, commentators have suggested that the Florida Supreme Court might properly exercise this type of jurisdiction in the rare event that a district court has summarily affirmed a lower court’s ruling expressly invalidating a statute.<sup>320</sup> One possible basis for doing so could be the Court’s all writs jurisdiction, discussed below.<sup>321</sup>

There was some concern at one point that this form of jurisdiction might only apply when a statutory or constitutional provision is declared facially invalid and not where invalidity was “as applied.”<sup>322</sup> However, the Court has not recognized this distinction. “As applied” invalidity has

316. See FLA. CONST. art. V, § 3(b)(2).

317. See *id.* § 3(b)(1).

318. *Id.* Any direct statement by a district court that a statute or constitutional provision is invalid almost certainly would be construed as a holding and thus part of the decision, even if unnecessary to the case. Review then could be had on that basis. However, the Florida Supreme Court did decline review in one case with peculiar facts. In *Hanft v. Phelan*, 488 So. 2d 531 (Fla. 1986), the court dismissed jurisdiction where invalidity was only one of several alternative holdings and the district court had remanded for an evidentiary hearing to determine which of the holdings was proper in the specific case. *Id.* at 532. Absent the remand for an evidentiary hearing, it seems unlikely that *Hanft* would have been dismissed merely because there were alternative holdings. *Id.*

319. For a discussion of this “inherent invalidity” argument, see Arthur J. England, Jr., et al., *Florida Appellate Reform One Year Later*, 9 FLA. ST. U. L. REV. 221, 229 (1981). As this article notes, the first “inherent invalidity” case in which jurisdiction was denied apparently was *Southern Gold Citrus v. Dunnigan*, 399 So. 2d 1145 (Fla. 1981). For a discussion of the now-abolished inherency doctrine see *infra* notes 342-43 and accompanying text.

320. Arthur J. England, Jr., et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reforms*, 32 U. FLA. L. REV. 147, 169-70 (1980) [hereinafter *Jurisdiction*].

321. See discussion *infra* part VII.E.

322. See *Jurisdiction*, *supra* note 320, at 170.

been used as the basis for jurisdiction, though the Court apparently has done so without comment by extension from earlier case law.<sup>323</sup> Before the 1980 reforms, "as applied" jurisdiction had proven controversial, being disallowed in 1961,<sup>324</sup> but then authorized again in 1963 by a divided court.<sup>325</sup> The practice was reaffirmed in 1979 shortly before the most recent jurisdictional reforms, again by a fragmented court.<sup>326</sup>

Earlier criticisms may still have some merit in that an "as applied" decision invalidates a statute or constitutional provision only in cases with similar facts. Thus, there is a less pressing reason for mandatory review, because the decision under appeal essentially leaves the statute or provision in effect but subject to a fact-specific exception. However, much of the earlier criticism arose from the fact that trial court orders declaring a statute invalid were directly appealable to the Florida Supreme Court.<sup>327</sup> This is no longer the case. In any event, "as applied" cases have been relatively few and probably serve a useful function in settling partial doubts about a statute's enforcement.

In this vein, it also is worth noting that the apparent purpose of mandatory jurisdiction in these cases is to achieve some degree of finality and uniformity of law. If the Florida Supreme Court were not required to hear an appeal, then the district court opinions in question might remain on the books for years without being either approved or disapproved. As a result, statutes or constitutional provisions might be enforced in some appellate districts but not others. Mandatory supreme court jurisdiction greatly diminishes these possibilities.

Such problems cannot be completely eliminated, however. Any state court opinion striking a provision of the Florida Constitution could do so only on grounds that the provision violated the United States Constitution, a federal statute, or a treaty binding upon the state through the Supremacy Clause.<sup>328</sup> That necessarily means that the Florida Supreme Court's resolution of the issue would rest entirely on federal questions that would be reviewable by the United States Supreme Court and could be decided

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323. See *Psychiatric Assoc. v. Siegel*, 610 So. 2d 419, 421-22 (Fla. 1992) (accepting jurisdiction for "as applied" invalidity).

324. *Stein v. Darby*, 134 So. 2d 232 (Fla. 1961).

325. *Snedeker v. Vernmar, Ltd.*, 151 So. 2d 439 (Fla. 1963).

326. *Cross v. State*, 374 So. 2d 519 (Fla. 1979).

327. See *Jurisdiction*, *supra* note 320, at 166.

328. U.S. CONST. art. VI, cl. 2.

differently by some federal courts. Thus the Florida Supreme Court's determination of the case would not necessarily be the final word.

## VI. DISCRETIONARY REVIEW JURISDICTION

The Florida Supreme Court's discretionary review jurisdiction accounts for the largest share of the petitions that it receives. This type of jurisdiction is "discretionary" because the Court, in every instance, can decline to hear a case without reason, and in some instances must decline because the law restricts discretion.<sup>329</sup> All cases brought under this type of jurisdiction technically are called "reviews," as distinguished from "appeals," though lawyers and justices alike sometimes use the terms interchangeably.<sup>330</sup> The distinction between the terms is found in the constitution itself.<sup>331</sup> In a more colloquial sense, "reviews" in this category do, in fact, constitute a type of "appellate" jurisdiction because the Court is reviewing actions taken by lower courts.

Jurisdiction over discretionary review cases is invoked when a party files two copies of a notice that review is being sought, which must be done within thirty days of rendition<sup>332</sup> of the order in the case.<sup>333</sup> The notice must be filed with the clerk of the district court, must be accompanied by the proper fee, and must be in the form prescribed by rule.<sup>334</sup> Briefing on jurisdiction is allowed in all cases except where the district court has certified a question of great public importance, or has certified that the case is in direct conflict with the decision of another district court.<sup>335</sup>

### A. Declaration of Statutory Validity

The first type of discretionary review jurisdiction governs district court decisions expressly declaring a state statute valid.<sup>336</sup> For jurisdiction to

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329. For a discussion of "discretion" see *supra* part III.A.3.

330. For a discussion distinguishing reviews from appeals see *supra* text accompanying note 279.

331. See FLA. CONST. art. V, § 3(b).

332. Rendition occurs when a signed, written order is filed with the clerk of the lower tribunal, subject to some exceptions. See FLA. R. APP. P. 9.020(g).

333. *Id.* at 9.120(b).

334. See *id.* at 9.200(b-c), 9.900.

335. *Id.* at 9.120(d). "Certified question" is discussed *infra* part VI.E. "Certified conflict" is discussed *infra* part VI.F.

336. FLA. CONST. art. V, § 3(b)(3).



exist, the decision under review must contain some statement to the effect that a specified statute is valid or enforceable.<sup>337</sup> The constitution does not directly say whether the statement must be necessary to the result reached. In a highly analogous context, however, the Court has expressly premised its jurisdiction on statements that were dicta.<sup>338</sup>

This conclusion is justifiable in the sense that dicta have persuasive force. At first blush, however, it does seem somewhat at odds with the constitution's requirement that jurisdiction be based on a "decision."<sup>339</sup> At least in other contexts, the decision is the result reached and is not gratuitous dicta in the opinion.<sup>340</sup> However, the Florida Supreme Court has indicated that the term "decision," as used in the constitution's jurisdictional sections, encompasses not merely the result but also the entire opinion.<sup>341</sup> In any event, the fact that a statute is declared valid in dicta may lessen the desire of the Court to exercise its discretion over the case, unless perhaps some injustice may result if the dicta are given effect by other courts.

Historically, the 1980 jurisdictional amendments overruled the so-called "inherency doctrine"<sup>342</sup> by which review might be had if the Court found that an opinion tacitly found a statute valid.<sup>343</sup> This might occur, for example, where the opinion applied the statute as though it were valid but did not directly make a finding of validity. Following the 1980 amendments, the inherency doctrine has not been mentioned or used, and obviously is no longer viable.

## B. *Construction of State or Federal Constitutions*

The second form of discretionary jurisdiction arises when the decision of the district court below expressly construes a provision of the state or federal constitutions.<sup>344</sup> The operative phrase "construes a provision" was

337. See *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986).

338. *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984) (involving express and direct conflict of decisions).

339. See FLA. CONST. art. V, § 3(b)(3).

340. The Court has recognized the importance of the distinction in analogous contexts. See *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (jurisdiction based on express and direct conflict of decisions of different courts of appeal or the supreme court).

341. *Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).

342. See *Harrell's Candy Kitchen, Inc. v. Sarasota—Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959).

343. See *Jurisdiction*, *supra* note 320, at 183.

344. FLA. CONST. art. V, § 3(b)(3).

imported into the 1980 jurisdictional reforms essentially unchanged from what had existed previously, with the word “expressly” being an addition.<sup>345</sup> Commentators in 1980 stated their view that the new requirement of “expressness” merely codified prior case law,<sup>346</sup> a view the Court apparently has neither accepted nor rejected. However, it does seem likely that pre-1980 case law on this type of jurisdiction remains persuasive at least to some extent.

Prior to the 1980 reforms, the Court held that the inherency doctrine does not apply to this type of jurisdiction.<sup>347</sup> Rather, the decision under review had to “explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.”<sup>348</sup> The key word was “doubts”: The opinion under review had to contain a statement recognizing or purporting to resolve some doubt about a constitutional provision. Moreover, this statement had to be a “ruling”<sup>349</sup> that was more than a mere application of a settled constitutional principle.<sup>350</sup> Absent the obligatory act of construction, it was not enough that a petitioner simply alleged an unconstitutional result.<sup>351</sup> Commentators called this the “explain or amplify” requirement.<sup>352</sup>

On policy grounds, this entire analysis still makes good sense. The Florida Supreme Court is the one state court that can resolve legal doubts on a statewide basis. Resolving constitutional doubts is a highly important function because it results in more predictable organic law. No similar purpose is served by the Court hearing a case that has merely reiterated settled principles. The Court’s function, in other words, is to say whether an evolution in constitutional law developed by the lower appellate courts is proper,<sup>353</sup> or to resolve a doubt those courts have expressly noted.<sup>354</sup>

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345. See *Jurisdiction*, *supra* note 320, at 184-85.

346. *Id.* at 184.

347. *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973).

348. *Id.* (quoting *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958)).

349. *Dykman v. State*, 294 So. 2d 633, 635 (Fla. 1973), *cert. denied*, 419 U.S. 1105 (1975).

350. *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973), *cert. denied*, 419 U.S. 851 (1974).

351. *Carmazi v. Board of County Comm’rs*, 104 So. 2d 727, 728-29 (Fla. 1958).

352. Arthur J. England, Jr. et al., *Florida Appellate Reform One Year Later*, 9 FLA. ST. U. L. REV. 221, 240 (1981).

353. Any evolution in law by a lower court inherently creates a “doubt”: Is the new principle or the new application correct?

354. A district court sometimes may outline its doubts about what appears to be a settled constitutional principle it is applying. The statement of doubt creates an issue that sometimes may deserve resolution by the Florida Supreme Court.

The Court's recent cases on this form of jurisdiction seem to be in accord with the pre-1980 analysis outlined above.<sup>355</sup>

There are a few problems, however. For one thing, the line that separates "explain or amplify" from "mere application" has sometimes been hard to see. In the 1975 case *Potvin v. Keller*,<sup>356</sup> for example, the Court's majority reviewed a district court opinion that merely mentioned the appellants' Fourteenth Amendment argument, and then affirmed the trial court's order without stating whether the Fourteenth Amendment had any bearing on the decision.<sup>357</sup> The Florida Supreme Court's majority in *Potvin* buttressed its jurisdiction with the following explanation: The district court had "ruled" that "no constitutional infirmity" existed based on the specific facts at hand.<sup>358</sup>

Later in the opinion's analysis, the majority also noted that the district court's opinion "may" have overstated federal case law when talking about constitutional and statutory rights that were not further identified.<sup>359</sup> Thus, the district court arguably had tried to eliminate a doubt about the Fourteenth Amendment. A misapplication of settled law obviously can be viewed as an evolutionary development deserving correction; but on *Potvin*'s peculiar facts, some straining was needed to reach so far, especially because the lower court's result was affirmed.

The strain is especially evident when a second question is posed: How specifically must the district court identify a constitutional provision it is construing? The district court in *Potvin* did not premise its actual holding on any specific provision, though the court probably misconstrued a federal case dealing with the Fourteenth Amendment. In other words, a reader could not finally determine that the Fourteenth Amendment was being construed in *Potvin* without reading, or having prior knowledge of, the federal case cited therein.<sup>360</sup>

This analysis risks creating a kind of "cross-reference" jurisdiction any time an opinion cites to materials analyzing a constitutional provision. Such a possibility is very difficult to square with the requirement that construction must be "express." *Potvin* probably is best understood as a dated and

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355. *E.g.*, *Foster v. State*, 613 So. 2d 454 (Fla. 1993); *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992); *City Nat'l Bank v. Tescher*, 578 So. 2d 701 (Fla. 1991).

356. 313 So. 2d 703 (Fla. 1975), *aff'g* 299 So. 2d 149 (Fla. 3d Dist. Ct. App. 1974).

357. *Id.* at 704 & n.1.

358. *Id.* at n.1.

359. *Id.* at 705 & n.4.

360. *See Potvin v. Keller*, 299 So. 2d 149, 151 (Fla. 3d Dist. Ct. App. 1974) (citing *In re Gault*, 387 U.S. 1 (1967)).

marginal case in which the Florida Supreme Court stretched the envelope of its jurisdiction to correct a deficient lower court analysis that, nevertheless, had reached a correct result. Moreover, the 1980 jurisdiction amendments could be viewed as superseding *Potvin* by adding the requirement that constitutional construction be “express.”<sup>361</sup>

The better approach is the one suggested in the Court’s earlier cases. For jurisdiction to exist, the district court’s opinion must explain or amplify some identifiable constitutional provision in a way that is an evolutionary development in the law or that expresses doubt about some legal point.<sup>362</sup> Misapplication of earlier law could rise to this level to the extent that it can be considered an evolutionary development; but even then, the decision under review should at least be grounded in the discussion of a specific constitutional provision. Obviously, it would be needlessly bureaucratic to require a formal method of citation. Any reference sufficient to identify some constitutional provision ought to qualify, even a clipped reference like “full faith and credit.”<sup>363</sup>

It remains to be seen whether dicta can be a sufficient basis for jurisdiction in cases of this type. The court has expressly used dicta to establish jurisdiction in analogous contexts,<sup>364</sup> and thus, probably could do so here as well. Dicta establishing some new principle of constitutional law would have persuasive value, though perhaps not quite amounting to “rulings.”<sup>365</sup> Review might be justified on that basis, especially where the dicta could be disruptive. But in any event, jurisdiction remains discretionary and could be declined if the dicta seem harmless.

### C. *Opinions Affecting Constitutional or State Officers*

The third basis of discretionary review jurisdiction exists when a decision of a district court expressly affects a class of constitutional or state officers.<sup>366</sup> Again, the operative language here was imported nearly unchanged from the pre-1980 constitution, but with the word “expressly” added. Commentators in 1980 noted that the “expressness” requirement had the principle purpose of foreclosing any review of a district court decision

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361. FLA. CONST. art. V, § 3(b)(3).

362. *Ogle*, 273 So. 2d at 391; *Dykman*, 294 So. 2d at 633.

363. See *Holbein v. Rigot*, 245 So. 2d 57, 59 (Fla. 1971).

364. *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984).

365. See *Dykman*, 294 So. 2d at 635. But cf. *Seaboard Air Line R.R.*, 104 So. 2d at 358 (term “decision” as used in the constitution’s jurisdictional provisions includes the entire written opinion).

366. FLA. CONST. art. V, § 3(b)(3).

issued without opinion.<sup>367</sup> The Court has adopted this view.<sup>368</sup> Other than that, the pre-1980 case law was largely unaffected and probably remains persuasive.

In 1974, the Court held that a decision does not fall within this type of jurisdiction unless it meets a very restrictive test; it must "directly and, in some way, *exclusively* affect the duties, powers, validity, formation, termination, or regulation of a particular class of constitutional or state officers."<sup>369</sup> Thus, the decision must do more than simply modify, construe, or add to the general body of Florida law. If other criteria are met, it is not necessarily dispositive that members of a valid class were or were not litigants in the district court.<sup>370</sup> The Court has also said that jurisdiction could exist even where *no* class members were parties to the action, provided the decision affects the entire class in some way "unrelated to the specific facts of that case."<sup>371</sup>

Most of the cases seem to assume that the parties to the proceedings below are the ones allowed to seek review in the Florida Supreme Court, even though they may not be members of the "affected class." However, this has not always been true. One case, *In re Order on Prosecution of Criminal Appeals*,<sup>372</sup> allowed jurisdiction even though review was sought by governmental agencies not actually a party in the proceedings below.<sup>373</sup> In any event, the case had very unusual facts, and may have been erroneously assigned to this particular subcategory of jurisdiction.

The case arose in 1990 when a district court entered a *sua sponte* order prohibiting a public defender from bringing appeals arising outside his own circuit. The incidental effect was to require public defenders in other circuits to handle their own appeals; and because the other circuits lacked adequate resources, county governments would be forced to pay for court-appointed private lawyers. After the order was entered, several county governments then filed a "motion for rehearing," which was summarily denied. The county governments next obtained review in the Florida Supreme Court, based not on their own constitutional status, but on the fact

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367. See *Jurisdiction*, *supra* note 320, at 187.

368. See *School Bd. of Pinellas County v. District Court of Appeal*, 467 So. 2d 985, 986 (Fla. 1985).

369. *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974).

370. *Id.*

371. *Id.*

372. 561 So. 2d 1130 (Fla. 1990).

373. *Id.*

that the district court's order incidentally affected the duties of public defenders.<sup>374</sup>

Presumably the act of filing the "motion for rehearing" somehow made the county governments a "party," but this is not at all clear. The summary order of dismissal is equally consistent with the view that the district court refused to recognize the county governments as a party. Moreover, it appears that no one raised or argued any objections to jurisdiction when the matter was brought to the Florida Supreme Court. It thus seems highly unlikely that the Court was creating any form of "third-party standing."

Whatever the case, *In re Order on Prosecution of Criminal Appeals* probably is better characterized as an exercise of the Court's "all writs" jurisdiction, which is discussed in greater detail below.<sup>375</sup> "All writs" review previously has been allowed to bring serious governmental crises for expedited review where some factual or procedural quirk threatens to deprive the Court of its "ultimate jurisdiction."<sup>376</sup> That situation almost certainly existed here, where a technical lack of standing might have frustrated the Florida Supreme Court's ultimate ability to review the case.<sup>377</sup> On the whole, *In re Order on Prosecution of Criminal Appeals* probably is better characterized as an all-writs case in which the wrong basis of jurisdiction was cited.

Another problem in this form of jurisdiction is the definition of the phrase "class of constitutional or state officers." The Court has held that the word "class" at the very least means there must be more than one officer of the type in question.<sup>378</sup> As a result, a decision affecting only the State Treasurer or only the Secretary of State does not establish jurisdiction. Likewise, there is no jurisdiction over a decision affecting only a single board with multiple members where the sole powers affected are those of the board as a single entity.<sup>379</sup> In such a situation, the entity constitutes only one "officer."<sup>380</sup>

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374. *Id.* at 1131-33; see Brief on Jurisdiction of Collier County, *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130 (Fla. 1990) (No. 74,574).

375. See discussion *infra* part VII.E.

376. *E.g.*, Florida Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982).

377. See discussion *supra* part III.A.3 for a discussion of the reasons why the lack of standing might have frustrated the court's ultimate ability to review the case.

378. Florida State Bd. of Health v. Lewis, 149 So. 2d 41, 43 (Fla. 1963).

379. *Id.*

380. *Id.*

The fact that an office or board is unique, thus, almost always means there is no jurisdiction.<sup>381</sup> But jurisdiction would exist, for example, where a decision affects every board of county commissioners in the state in some way peculiar to them as a class. At a minimum, there must be two or more officers or entities who separately and independently exercise identical powers of government that are peculiarly affected by the district court's decision.<sup>382</sup>

The Court apparently has rejected the view that the "class" requirement applies only to constitutional officers, not to state officers.<sup>383</sup> Indeed, the Court has never clearly distinguished the two types of officers. It is clear from the language of the cases that the Court considers a "constitutional officer" to include any office of public trust actually created by the constitution itself.<sup>384</sup> But it is apparently insufficient that the officer or entity is merely named in the constitution in an indirect or general way.<sup>385</sup>

381. The opinion in *State v. Bowman*, 437 So. 2d 1095 (Fla. 1983), at first blush, seems to reach a contrary result: The district court's opinion primarily affected the Attorney General, a unique office. Moreover, the Attorney General was the one who brought the case to the Florida Supreme Court. However, *Bowman* involved a question of whether a particular duty fell to the Attorney General or to the various State Attorneys throughout Florida. Thus, there was a "class" of constitutional officers whose duties were at stake. *Bowman* may be significant in that sense because the district court's opinion had determined that the duty in question fell to the Attorney General, not to the State Attorneys. Thus, *Bowman* tacitly recognizes jurisdiction where the district court's decision holds that the "class" of officers has no duty to act in a particular situation. *Bowman* is also significant in that it tacitly recognizes jurisdiction even where the petition for review is not brought by a member of the affected class—a conclusion supported by other cases. See *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1130.

382. *Lewis*, 149 So. 2d at 43.

383. See *Larson v. Harrison*, 142 So. 2d 727, 728 (Fla. 1962) (Drew, J., concurring specially).

384. *E.g.*, *Skitka v. State*, 579 So. 2d 102 (Fla. 1991) (stating that public defenders, created by the Florida Constitution, article V, section 18, are constitutional officers); *Ramer v. State*, 530 So. 2d 915 (Fla. 1988) (stating that sheriffs, created by the Florida Constitution article VIII, section 8(1)(d), are constitutional officers); *Bystrom v. Whitman*, 488 So. 2d 520 (Fla. 1986) (stating that property appraisers, created by the Florida Constitution, article VIII, section 1(d), are constitutional officers); *Jenny v. State*, 447 So. 2d 1351 (Fla. 1984) (stating that state attorneys, created by the Florida Constitution, article V, section 17, are constitutional officers); *Taylor v. Tampa Elec. Co.*, 356 So. 2d 260 (Fla. 1978) (stating that clerks of the circuit court, created by the Florida Constitution, article VIII, section 1(d), are constitutional officers).

385. For example, the Florida Constitution mentions "municipal legislative bodies." FLA. CONST. art. VIII, § (2)(b). Yet, the case law indicates that a city official is not a constitutional or state officer. *Estes v. City of N. Miami Beach*, 227 So. 2d 33, 34 (Fla. 1969).

The term "state officer" remains somewhat more vague. It apparently does not include purely local entities not created by the constitution itself.<sup>386</sup> Beyond that, the Court has said little. There has been no definitive statement that all local officials and entities are excluded if they fail to qualify as constitutional officers. A good argument can be made that a "class of state officers" should include offices of trust created *by statute* and authorized to independently exercise identical powers of government as part of some larger statewide scheme.<sup>387</sup> Examples might include the governing boards of Florida's water management districts.<sup>388</sup> However, this is an issue that remains undecided.

Finally, dicta theoretically might constitute a basis for exercising this type of jurisdiction. But in practice, the prerequisites for review here are so rigorous that dicta rarely would qualify. Dicta by definition are not binding,<sup>389</sup> and a petitioner presumably would need to show some real likelihood that the dicta could be enforced against the "affected" class. A scholarly court opinion, for example, sometimes might pose such a threat. Otherwise, there would be no actual effect on a class of constitutional or state officers, and thus no discretion to hear the case.

#### D. *Express and Direct Conflict*

By far the largest and most disputatious subcategory is jurisdiction premised on express and direct conflict,<sup>390</sup> usually called simple "conflict

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386. *Estes*, 227 So. 2d at 34; *Hakam v. City of Miami Beach*, 108 So. 2d 608 (Fla. 1959) (holding that a police officer is not a constitutional or state officer).

387. The constitution juxtaposes "constitutional officers" with "state officers." If a constitutional office is one created by the constitution, then it is reasonable to say that a state office is one created by statute. The "class" requirement obviously suggests that the office must exist in more than one location throughout the state. Unique local offices would not qualify. Finally, the rationale for exercising jurisdiction over a constitutional class of officers applies with equal force to a statutory class of officers: A district court opinion affecting either class could result in serious disruption of governmental services, requiring resolution by the state's highest court. On the whole, both the language of the constitution and public policy considerations support jurisdiction over a statutory class of officers that meet the other criteria.

388. See Fla. Stat. §§ 373.069-373.073 (1991) (creating districts and governing boards).

389. See *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984) (stating that language in a previous case was simply *obiter dicta* and should not be relied upon as case authority).

390. FLA. CONST. art. V, § 3(b)(3).



jurisdiction.”<sup>391</sup> Jurisdiction of this type exists where the decision of the district court expressly and directly conflicts with a decision<sup>392</sup> of another district court of appeal or of the Florida Supreme Court on the same question of law.<sup>393</sup> This relatively straightforward statement has taken on great complexity in practice. Conflict jurisdiction also is the subcategory most affected by the somewhat arcane distinction between “jurisdiction” and “discretion.”<sup>394</sup>

Historically, the 1980 jurisdictional reforms had one of the greatest effects on this type of jurisdiction. Prior to the amendments, a much broader form of conflict jurisdiction existed. It had come into existence in 1965 when a divided Florida Supreme Court held that conflict jurisdiction could exist over decisions affirming the trial court without opinion, in which the entire opinion usually said nothing but “PER CURIAM. AFFIRMED.”<sup>395</sup> (These opinions often are identified by the acronym “PCA.”)<sup>396</sup> Obviously, the determination of “conflict” in such cases only could be made by looking at the record, not from a review of the opinion under review.

By definition, a PCA establishes no precedent beyond the specific case, and Florida Supreme Court review thus, was of questionable utility. Through the years, the ability to review PCAs grew increasingly onerous and was sternly criticized, even by members of the Court.<sup>397</sup> The criticisms, along with the Court’s overburdened docket, led directly to the 1980 constitutional reforms.

## 1. The Elements of Obtaining Conflict Review

As a result of the 1980 reforms and the cases construing them, the Court potentially has conflict jurisdiction only over a district court decision

391. The term “conflict jurisdiction” is almost never used to refer to “certified conflict,” which is a separate subcategory. See discussion *infra* part VI.F.

392. The term “decision” has been held to include both the judgment and opinion for purposes of the Florida Supreme Court’s jurisdiction over “decisions.” *Seaboard Air Line R.R.*, 104 So. 2d at 358.

393. FLA. CONST. art. V, § 3(b)(3).

394. See *supra* part III.A.

395. *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221 (Fla. 1965), *overruling* *Lake v. Lake*, 103 So. 2d 639 (Fla. 1958).

396. PCAs should be distinguished from “*per curiam*” opinions issued by the Florida Supreme Court, which are very different in nature. See discussion *supra* part II.D.

397. *E.g.*, *Florida Greyhound Owners & Breeders Ass’n v. West Flagler Assocs.*, 347 So. 2d 408, 410-12 (Fla. 1977) (England, J., concurring).

containing at least a statement by a majority<sup>398</sup> (however short) or a majority citation to authority.<sup>399</sup> If there is any question, petitions seeking jurisdiction are brought to the justices and their staffs. At this point, there must be some further examination to determine if several threshold requirements have been met.

This examination is constrained by the “four-corners” rule: Conflict must “appear within the four corners of the majority decision” brought for review.<sup>400</sup> There can be no examination of the record, no second-guessing of the facts stated in the majority decision, and no use of extrinsic materials to clarify what the majority decision means. In the vast majority of cases, the Court strictly honors the four-corners rule, though there are rare cases difficult to square with it.

Within the constraints of the four-corners rule, review will be allowed only if the following questions are all answered in the affirmative: (a) does jurisdiction actually exist?; (b) does discretion exist?; and, (c) is the case significant enough to be heard? The three elements are easy to see in some types of cases, harder in others.

#### *a. Does Jurisdiction Exist?*

The most obvious effect of the 1980 reforms was to eliminate completely the Court’s jurisdiction over a large number of PCAs—those issued without statement or citation. If a PCA includes no statement by a majority (however short) and no majority citation to authority, then the Court completely lacks jurisdiction to review the case.<sup>401</sup> Statements in a separate opinion, whether dissenting or concurring, are not sufficient if there is no majority statement or citation.<sup>402</sup>

It deserves to be stressed that jurisdiction is completely absent in these cases; it is not that the Court simply lacks discretion to hear the cause.<sup>403</sup>

398. The court has held that discussion of the “legal principles which the court applied supplies a sufficient basis for a petition for conflict review.” *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981). There is no requirement that the district court opinion must explicitly identify conflicting decisions. *Id.*

399. *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981).

400. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Here, the court clearly is using the term “decision” to encompass both the result and the entire opinion; *accord Seaboard Air Line R.R.*, 104 So. 2d at 358.

401. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

402. *Id.*

403. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). In other words, any further appeal from a PCA issued without a majority statement or citation can be had

As a result, the Clerk of the Court routinely issues a form summary denial in most cases brought for review to the Court based on a PCA that lacks a majority statement or citation to authority. The justices and their staffs usually do not review these petitions, and filing them thus is a complete waste of time, resources, and money.

The case law has established only one other category of district court opinions over which the Court *may* completely lack conflict jurisdiction.<sup>404</sup> These are PCAs that contain nothing but a citation to authority (called "citation PCAs"). In 1988, the Court distilled much of its earlier law on this question into a single formula. In *The Florida Star v. B.J.F.*,<sup>405</sup> the Court said that there is no jurisdiction over a citation PCA unless "one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court."<sup>406</sup>

As noted earlier, the failure to meet any of these requirements strips the Court of all jurisdiction, which can have significant consequences when further appeal may be sought in the United States Supreme Court.<sup>407</sup>

As is apparent from the language quoted here, the citation to authority must be to a *case*<sup>408</sup> issued by a Florida district court of appeal or by the Florida Supreme Court.<sup>409</sup> A citation to a statute, administrative or court rule, federal case, or case from another jurisdiction is insufficient in itself to establish discretion for a review.

Citation to a case from the *same* district court of appeal can establish jurisdiction only if that case is pending for review in or has been reversed by the Florida Supreme Court.<sup>410</sup> Thus, a "*contra*" or "*but see*" citation to an opinion of the same district court would not in itself establish conflict. This rests on a simple rationale. The fact that a district court decides to expressly or silently depart from its own case law does not establish conflict, because there is no such thing as "intradistrict conflict" as a basis for

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only in the United States Supreme Court, in its discretion. Attempting to bring the case for review in the Florida Supreme Court may have the effect of barring an appeal to the United States Supreme Court, because the time to file the appeal most likely will be consumed. *Id.*

404. Theoretically there could be another: PCAs that contain only a statement insufficient to establish a point of law, without citation. The Court apparently has never addressed this question.

405. 530 So. 2d at 286.

406. *Id.* at 288 n.3 (citing *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981)).

407. See *supra* text accompanying note 206-09.

408. *The Florida Star*, 530 So. 2d at 288 n.3 (citing *Jollie*, 405 So. 2d at 420).

409. FLA. CONST. art. V, § 3(b)(3).

410. *Jollie*, 405 So. 2d at 420.

supreme court jurisdiction. The latest inconsistent opinion is deemed to overrule the earlier.<sup>411</sup>

On the other hand, jurisdiction exists if there is any notation in a citation PCA (or any other type of opinion, for that matter) of contrary case law issued by *another* district court of appeal or the Florida Supreme Court.<sup>412</sup> This may be as simple as a citation beginning with the signals “*contra*” or “*but see*,”<sup>413</sup> because they indicate contradiction. A citation beginning with “*but cf.*” may be insufficient<sup>414</sup> because the signal indicates contradiction only by analogy,<sup>415</sup> which may not meet the constitutional requirement of “direct” conflict.<sup>416</sup>

Often, a citation PCA may include a parenthetical statement that conflict exists. The statement can establish jurisdiction only if it is accurate<sup>417</sup> and identifies a specific opinion of *another* district court or the Florida Supreme Court as the basis for conflict. But when this happens, it is possible that jurisdiction may exist on a completely independent basis—the Court’s “certified conflict” jurisdiction, discussed below.<sup>418</sup> The possibility always should be considered, because “certified conflict” is a less restrictive form of jurisdiction.<sup>419</sup>

411. *State v. Walker*, 593 So. 2d 1049, 1049 (Fla. 1992).

412. *See Stevens v. Jefferson*, 436 So. 2d 33, 34 & n.\* (Fla. 1983), *aff’g* 408 So. 2d 634 (Fla. 5th Dist. Ct. App. 1981). A district court may seem foolish recognizing contrary authority from the Florida Supreme Court, but this sometimes happens with good reason. In *Watson Realty Corp. v. Quinn*, 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983), the First District Court of Appeal noted that it was departing from dicta issued by the Florida Supreme Court in *Canal Authority v. Ocala Manufacturing, Ice & Packing Co.*, 435 So. 2d 950 (Fla. 1st Dist. Ct. App. 1983) (citing *Canal Auth. v. Ocala Mfg., Ice & Packing Co.*, 332 So. 2d 321 (Fla. 1976)). The district court believed the dicta to be incorrect, and the Florida Supreme Court later agreed. *Watson Realty Corp. v. Quinn*, 452 So. 2d 568 (Fla. 1984).

413. *See Frederick v. State*, 472 So. 2d 463 (Fla. 1985), *aff’g* 472 So. 2d 463 (1985).

414. Such citations are rare. *See, e.g., Cherry v. State*, 618 So. 2d 255 (Fla. 1st Dist. Ct. App. 1993); *Phelps v. State*, 368 So. 2d 950 (Fla. 2d Dist. Ct. App. 1979). No further review was taken in either of these cases.

415. *See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* rule 1.2, at 23 (15th ed. 1991).

416. FLA. CONST. art. V, § 3(b)(3).

417. The accuracy requirement arises from the plain language of the constitution that there must be express and direct conflict appearing on the face of the decision below. FLA. CONST. art. V, § 3(b)(3). The fact that the parties assert conflict in their jurisdictional briefs will not supply this requirement, even if both parties erroneously conclude that conflict exists.

418. *See discussion infra* section VI.F.

419. *See infra* text accompanying notes 493-95.

*b. Does Discretion Exist?*

Except for PCAs that fail to meet the criteria outlined above, the Florida Supreme Court technically has *jurisdiction* over all other district court opinions. However, that is not the end of the matter. The Court may still lack *discretion* to hear the particular case.<sup>420</sup> As noted earlier, the distinction between “jurisdiction” and “discretion” is somewhat arcane and really is relevant only in determining the time to bring appeals to the United States Supreme Court. So, in common usage, lawyers and justices often tend to speak of both under the rubric “jurisdiction.”

Nevertheless, in 1988, the Court indicated that, apart from the special rules governing PCAs, the problem of “conflict” involves a constitutional limit on the Court’s discretion to hear a case, not a limit on jurisdiction.<sup>421</sup> If there is no conflict, then there is no discretion, and the petition for review must be denied or dismissed on that basis.<sup>422</sup> Thus, the existence of conflict is an absolute prerequisite for a review.<sup>423</sup> In addition, conflict cannot be “derivative.” It is insufficient that a decision cites as controlling authority a completely separate decision that supposedly is in conflict with a third decision,<sup>424</sup> unless some other basis for jurisdiction exists. In other words, there is no such thing as “daisy-chain” conflict.

The jurisdiction/discretion distinction has prompted “creative” efforts to expand conflict jurisdiction, which the Court consistently has declined to entertain. After *The Florida Star* established the distinction, some parties seized upon language in that opinion to argue that conflict jurisdiction can be merely “hypothetical.” This was a misreading of the opinion of *The Florida Star* and a misapprehension of the difference between “jurisdiction” and “discretion.”

In *The Florida Star*, the Court said that *jurisdiction* exists if a district court decision contains any statement or citation that “hypothetically could create conflict if there were another opinion reaching a contrary result.”<sup>425</sup> However, *discretion* is still limited by the conflict requirement;<sup>426</sup> a petitioner, therefore, *also* must establish that discretion to hear the case

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420. *The Florida Star*, 530 So. 2d at 288-89.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Dodi Publishing Co. v. Editorial Am., S.A.*, 385 So. 2d 1369, 1369 (Fla. 1980).

425. *The Florida Star*, 530 So. 2d at 288.

426. *Id.*

genuinely exists. Any petition arguing “hypothetical conflict” alone would fail to address the discretion problem, and could be denied on that basis.

In a larger sense, the overriding purpose of conflict review remains the elimination of inconsistent views about the same question of law.<sup>427</sup> But this does not necessarily mean the Court can review a case only when necessary to resolve a conflict of *holdings*. Many conflict cases accepted by the Court fall within this last grouping, but not all do. Part of the reason is that a genuine “conflict” can be manifested in more than just a holding. The result is that several types of conflict have been recognized. In actual practice, the Court tends to accept cases that fall into four broad and sometimes overlapping categories: (i) “holding” conflict, (ii) misapplication conflict, (iii) apparent conflict, and (iv) “piggyback” conflict.

#### (i) “Holding” Conflict

The most obvious conflict cases involve “holding conflict”: The majority decision below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court or of the Florida Supreme Court. In other words, there is an actual conflict of controlling, binding precedent. Where this is true, conflict jurisdiction unquestionably exists.

For example, a district court in 1992 issued an opinion expressly applying the doctrine of interspousal immunity in a particular case.<sup>428</sup> While review was pending, the Florida Supreme Court issued an opinion in another case holding that the doctrine of interspousal immunity no longer existed in Florida.<sup>429</sup> These two opinions are in actual and irreconcilable conflict with one another, because the holding of one cannot stand if the other is true. Conflict jurisdiction therefore exists.

Conflict is not always so plain as this example, however. The cases in question may be factually distinguishable to a greater or lesser extent. As a result, the “holding conflict” category probably should not be considered entirely discrete from other categories. “Holding conflict” sometimes may blur into the next two kinds of conflict, which themselves are not entirely distinct.

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427. *E.g.*, *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985); *see* FLA. CONST. art. V, § 3(b)(3).

428. *McAdam v. Thom*, 610 So. 2d 510 (Fla. 3d Dist. Ct. App. 1992), *quashed by* 626 So. 2d 184 (Fla. 1993).

429. *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993).

## (ii) Misapplication Conflict

A separate kind of conflict occurs when the decision of the district court misapplies controlling precedent.<sup>430</sup> "Misapplication conflict" thus is not precisely the same as "holding conflict," because the cases involved are distinguishable. The conflict arises because the district court has failed to distinguish the cases properly. In other words, no conflict would have existed had controlling precedent been read and applied properly. Misapplication conflict comes in three varieties: "erroneous reading" of precedent, "erroneous extension" of precedent, and "erroneous use" of facts.

"Erroneous reading" cases are the most clearly justifiable of the three because they involve a purely legal problem: Was the law properly stated? Thus, they sometimes verge on being "holding conflict" cases. For example, in 1982, the Court confronted a case in which the district court first had misinterpreted controlling precedent on awards of punitive damages and then had applied the misinterpretation to the case. The Florida Supreme Court accepted jurisdiction expressly because of misapplication conflict.<sup>431</sup> This was not precisely a "holding conflict" case, however. Two dissenting justices argued that the district court actually had read the precedent correctly.<sup>432</sup> In other words, misapplication was not necessarily clear until the Court's majority decided the matter.

"Erroneous extension" cases are those in which the district court correctly states a rule of law but then proceeds to apply the rule to a set of facts for which it was not intended. In other words, the district court stated the law correctly and framed the facts accurately, but it should never have linked the two. This type of conflict is easily masked as some other type of conflict, and for that reason is seldom expressly discussed in majority opinions. The fact of the erroneous extension is occasionally noted in opinions dissenting as to a denial of jurisdiction.<sup>433</sup> Prior to 1980, the Court expressly had recognized "erroneous extension" as a valid basis of conflict jurisdiction.<sup>434</sup>

"Erroneous use" cases are those in which the district court misapplies a rule of law based on its own misperception of the facts.<sup>435</sup> This is the most troublesome form of misapplication conflict, because it often tests the

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430. *E.g.*, *Acensio v. State*, 497 So. 2d 640, 641 (Fla. 1986).

431. *Arab Termite & Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039, 1041 (Fla. 1982).

432. *Id.* at 1043 (Sundberg, C.J., dissenting, joined by Adkins, J.).

433. *E.g.*, *Salser v. State*, 613 So. 2d 471, 473 (Fla. 1993) (Kogan, J., dissenting).

434. *Sacks v. Sacks*, 267 So. 2d 73, 75 (Fla. 1972).

435. *E.g.*, *Acensio*, 497 So. 2d at 640.

strength of the four-corners rule. Sometimes the factual error may be evident on the face of the opinion, but often it is not. For example, in 1985, the Court accepted jurisdiction in a case where the district court had “overlooked” a relevant factual finding of the trial court. Although controlling law was stated properly, the district court’s opinion improperly applied the law because of the overlooked finding.<sup>436</sup>

The discretion to review such cases really is only justifiable where the factual error is apparent within the four corners of the opinion being reviewed.<sup>437</sup> The justification becomes tenuous otherwise. In *State v. Stacey*,<sup>438</sup> for example, the district court opinion did in fact “overlook” the relevant finding. At best, the *possibility* of the error could be inferred from the district court opinion, but the facts stated therein were not complete enough to show that error was clear. “Inferential” factual error is a very slim reed to support a finding of express and direct conflict.<sup>439</sup> Obviously, the justification for a review becomes even less justifiable if the existence of the error cannot even be inferred from material contained within the four corners of the district court opinion. Thus, to some extent the Florida Supreme Court violated the four-corners rule in accepting jurisdiction; and that case is probably best understood as marginal and anomalous.

Finally, there is a possibility that a case may involve an alleged misapplication of dicta. In 1984, the Court accepted a case based on conflict with dicta in a prior Florida Supreme Court opinion, although the Florida Supreme Court overruled the dicta rather than the district court.<sup>440</sup> If “dicta conflict” existed in that context, it probably also could exist as a form of misapplication conflict. Dicta conflict can be justified in light of the fact that the Florida Supreme Court elsewhere has suggested that its jurisdiction over “decisions” can rest on anything in a written opinion, not merely a judgment or result.<sup>441</sup>

For example, a scholarly opinion may make broad statements of law that are actually dicta, yet these statements express an opinion about some legal point. Later a district court conceivably could find the dicta persuasive

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436. *State v. Stacey*, 482 So. 2d 1350, 1351 (Fla. 1985).

437. The court elsewhere has said that in determining conflict there can be no consideration of facts outside the four corners of the opinion. *Hardee v. State*, 534 So. 2d 706, 708 (Fla. 1988).

438. 482 So. 2d 1350 (Fla. 1985).

439. *See Department of Health & Rehab. Servs. v. National Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (conflict cannot be inferred or implied).

440. *Watson Realty Corp.*, 452 So. 2d at 568.

441. *Seaboard Air Line R.R. v. Branham*, 104 So. 2d 356, 358 (Fla. 1958).



and then misapply them. In such a situation, all the reasons justifying review of misapplication conflict also would apply: Review would be warranted to the extent the misapplication may create confusion in the law or reach an incorrect or unfair result.

### (iii) Apparent Conflict

Another category is "apparent conflict," which arises when a district court opinion only seems to be in conflict, though there may be some reasonable way to reconcile it with the case law. A cramped reading of the constitution might suggest that discretion should not be allowed here.<sup>442</sup> However, such an approach ignores the real problem. Until the Florida Supreme Court harmonizes cases that seem to be in conflict, for all intents and purposes, there is an actual conflict. The mere fact that conflict can be eliminated on review does not resolve the conflict retroactively.

Moreover, it would be bad practice to deprive the Court of discretion merely because there is some way to harmonize cases without overruling any of them. This amounts to saying that the Court, in conflict cases, can review only if it negates, which will not always be desirable policy. The Florida Supreme Court should not be forced either to decline jurisdiction or overrule essentially sound decisional law whose relation to other cases is simply uncertain.

In any event, review of apparent conflict cases is now a well established feature of Florida Supreme Court jurisdiction, and it may or may not result in the overruling of precedent from a Florida appellate court. This can include "receding" from the Court's own cases.<sup>443</sup> In 1991, for example, the Court accepted jurisdiction to resolve an apparent conflict with overbroad statements of law that it had made in one of its own opinions two years earlier.<sup>444</sup> The Court ultimately receded from those statements, but without actually reversing the result it previously had reached; then the Court approved the district court's decision, harmonizing the cases and eliminating the apparent conflict.<sup>445</sup>

Apparent conflict sometimes may arise from a prior district-court opinion that simply is not very precise. In 1988, for example, the Court accepted a case based on apparent conflict with another district court

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442. See FLA. CONST. art. V, § 3(b)(3).

443. "Recede" is the term of art used when the court overrules its own decisions in whole or in part.

444. *Public Health Trust of Dade County v. Menendez*, 584 So. 2d 567 (Fla. 1991).

445. *Id.* at 569-70.

opinion that had not stated sufficient facts for anyone to determine whether the ruling was correct.<sup>446</sup> In that sense, the earlier case could be considered overbroad, but was not necessarily so. The Florida Supreme Court resolved the apparent conflict by disapproving the earlier case “only to the extent that it may be inconsistent” with a correct and complete statement of the relevant law.<sup>447</sup> In a similar case, the Court said that conflict exists if a rule of law is stated vaguely or imprecisely enough to create a “fair implication” of conflict.<sup>448</sup>

Of course, the Court need not overrule anything. In a sizable number of apparent conflict cases, the Court harmonizes all the “conflicting” cases, thus completely eliminating any possible conflict.<sup>449</sup> In 1990, for example, the Court accepted review in a case “because of apparent conflict with the decisions of several district courts of appeal.”<sup>450</sup> The Court then engaged in an extensive examination of these cases, harmonized them, and made a holding without overruling anything.

In a sense, dicta conflict can be viewed as a type of apparent conflict because dicta are not binding precedent; and thus, there cannot be an actual conflict of holdings. As noted above, however, the Court has accepted review based on dicta conflict, although these cases seem more the exception than the rule.<sup>451</sup> Dicta conflict also may blur into the category of misapplication conflict.<sup>452</sup>

#### (iv) “Piggyback” Conflict

The final category of conflict is “piggyback” conflict. Discretion over these cases arises because: (a) they cite as controlling precedent a decision of a district court that is pending for review in, or has been overruled by, the Florida Supreme Court; or (b) they cite as controlling precedent a

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446. *D’Oleo-Valdez v. State*, 531 So. 2d 1347 (Fla. 1988).

447. *Id.* at 1348.

448. *Hardee*, 534 So. 2d at 708. These examples also demonstrate applications of the four-corners rule: The court should confine its determination to the four corners of the conflicting district court opinions, making no attempt to review the record in the earlier district court. The decision whether discretion exists must be made based on the facts as stated in the four corners of the “conflicting” opinions. *Id.*

449. *E.g.*, *Fitzgerald v. Cestari*, 569 So. 2d 1258 (Fla. 1990); *Cross v. State*, 560 So. 2d 228 (Fla. 1990); *Balthazar v. State*, 549 So. 2d 661 (Fla. 1989); *Conway Land, Inc. v. Terry*, 542 So. 2d 362 (Fla. 1989).

450. *Fitzgerald*, 569 So. 2d at 1258.

451. *Watson Realty Corp.*, 452 So. 2d at 568.

452. See discussion *supra* part VI.D.1.b.ii.

decision of the Florida Supreme Court from which the Court now has receded.<sup>453</sup> A considerable number of cases falling within this category are citation PCAs, but not all are. The district courts sometimes issue lengthy opinions resting on precedent that is pending review in the Florida Supreme Court or precedent that is later overruled.

There are good reasons for allowing this type of discretion. For example, the lower appellate courts often have a large number of cases before them dealing with the same legal issue. To save both time and resources, one case is selected as the "lead case" to be decided with a full opinion, while the others are resolved in short opinions that often do little more than cite to the lead case. It is illogical and unfair to say the Florida Supreme Court has discretion to take the lead case but not the "companion" cases. For this reason, the Court accepts the bulk of "piggyback" cases for review, though these often are handled as no request cases.<sup>454</sup>

It is worth noting, however, that "piggyback" conflict by definition would not exist for the "lead" case in this example. "Piggyback" conflict exists only if a case cited as controlling precedent already has gotten into the courthouse door on some other jurisdictional basis or the case has been disapproved or receded from.

This leads to another problem: "Piggyback" conflict sometimes may be only an inchoate, unrealized possibility at the time when review must be sought. For example, the Florida Supreme Court may be uncertain for a time whether it will accept a lead case for review. Perhaps the justices are divided on the correctness of the lead case or they are uncertain as to whether they have discretion to hear it. During the interim, jurisdiction remains inchoate.

In such instances, the Court typically follows a practice of postponing its decision on jurisdiction and sometimes permits parties to brief the substantive issues in the interim.<sup>455</sup> Once the lead case is accepted for review, the companion cases may be accepted, except on some occasions when "piggyback" cases actually reached the correct result. A denial of jurisdiction in the lead case eliminates "piggyback" jurisdiction, meaning that review will be declined in the companion cases unless some other basis for jurisdiction exists.

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453. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988) (citing *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981)).

454. See discussion *supra* Section II.B.2.

455. FLA. R. APP. P. 9.120(e).

c. *"Is the Case Significant Enough?"*

The final element in obtaining review of a conflict case is a showing that the issues are significant enough for the Court to exercise its discretion. Often the importance or insignificance of the case is obvious to everyone. At other times, a case may seem trivial at first blush, yet in fact involves a potential for serious disruption. For that reason, persons trying to invoke the Court's conflict jurisdiction are well advised to explain why the case is important enough to be heard. Conflict jurisdiction is discretionary. Even if discretion exists, the Court is free to deny the petition if the issues seem unimportant or the result essentially fair or correct,<sup>456</sup> among other reasons.

It is worth noting that the act of accepting review based on conflict vests the Court with power to hear every issue in the case, not merely the conflict issues.<sup>457</sup> As a result, these "nonconflict" issues sometimes may weigh with the Court in deciding whether to accept review. However, the fact that these issues may seem important will not cure a lack of conflict. Finally, the Court also has inherent authority *not* to address nonconflict issues if it chooses.<sup>458</sup> Doing so establishes no supreme court precedent as to these issues.

## 2. Briefing on Conflict Jurisdiction

For parties to invoke the Court's conflict jurisdiction, they must file jurisdictional briefs with the Court. The Rules of Court limit these briefs to ten pages.<sup>459</sup> However, the best briefs on conflict jurisdiction are shorter and make their points with direct, plain language. If conflict truly exists, all the brief need do is quote something from the district court opinion, show how it conflicts with a statement in another proper case, and then explain the importance of the case. For "piggyback" jurisdiction, it is sufficient (and imperative) to note the fact that a case cited in the district court opinion is pending review or has been disapproved or receded from.

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456. See *Wainwright v. Taylor*, 476 So. 2d 669, 670-71 (Fla. 1985) (petition dismissed in interests of judicial economy where outcome would not be different and where erroneous statement of law had been corrected by other means).

457. *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 531 (Fla. 1985); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982).

458. See, e.g., *Thom v. McAdam*, 626 So. 2d 184 (Fla. 1993).

459. FLA. R. APP. P. 9.210(a)(5).

In many cases, the actual point of the jurisdictional brief usually can be established in two pages or less per conflict issue<sup>460</sup> (not including appendices) if conflict genuinely is clear. Of course, the existence of conflict often is not so certain, meaning that a brief must engage in a lengthier and more convoluted argument to establish the Court's discretion over the case. Within the ten-page limit, the Court will not reject a petition simply because it is longer or wordy. However, the justices almost always view lengthier petitions as a kind of tacit concession that the alleged conflict is not clear. Attorneys who could make their points with less verbiage should consider whether they want to handicap their case with a longer brief.

Appendices should consist only of a copy of the decision below and a copy of the alleged conflict cases. Anything else is irrelevant and will be ignored, especially copies of material from the record. Under the four—corners rule, the record cannot be used to establish conflict, and attorneys who ignore this fact do themselves and their clients a disservice. The Court sometimes receives voluminous appendices that obviously cost a good deal to compile, reproduce, and bind. This is a pity, because such material has no purpose other than adding to the Court's drive to collect recyclable paper.<sup>461</sup>

Except for some PCAs in which jurisdiction is clearly lacking, nearly all jurisdictional briefs are handled and decided by the justices. Some justices routinely have their law clerks and interns prepare a brief memorandum summarizing relevant facts and holdings and making a recommendation. Other justices handle all "determinations of jurisdiction" ("DOJs") by themselves, on the theory that a law clerk memorandum simply duplicates effort. However, new law clerks and new interns are almost always assigned a stack of DOJs as their first task, on the theory that jurisdiction is the first thing a new law clerk or intern must learn. In a few offices, all DOJs are reviewed by the law clerks and interns before going to the justices.

When the justices' staff prepares memoranda on DOJs, these necessarily must focus on the three questions relevant to conflict cases: (a) does jurisdiction exist?; (b) does the Court have discretion to hear the case?; and (c) why should the discretion be exercised? As noted earlier, a case can be accepted for review only upon the affirmative vote of at least four justices, though the decision whether to grant oral argument sometimes can be determined by fewer votes or by the chief justice.

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460. Sometimes multiple conflict exists.

461. The court has instituted a very successful paper recycling program in recent years.

### 3. Opinion-Writing in Conflict Cases

Conflict cases are treated the same as other causes for purposes of opinion writing. There is one important point, however. A well-written conflict opinion should do one of three things before it concludes: disapprove a district court decision in whole or in part, recede from a Florida Supreme Court decision in whole or in part, or harmonize cases. This arises from the very nature of conflict jurisdiction, which exists only when two or more relevant cases directly or apparently are irreconcilable. Thus, for jurisdiction to exist, something must be wrong that needs "fixing." Fixing always requires that at least one previous statement of law be overruled or harmonized.

#### E. *Certified Questions of Great Public Importance*

The next subcategory of discretionary review jurisdiction exists when a decision of a district court passes upon a question certified by it to be of great public importance.<sup>462</sup> Commentators have noted that the operative language essentially was unchanged by the 1980 reforms, although the pre-1980 constitution specified that the question be one of great public "interest."<sup>463</sup> This last change, however, may only have been semantic. Even prior to 1980, certified questions routinely involved important issues in which the general public had little "interest," generally speaking.<sup>464</sup>

Justices of the Court sometimes have argued that certified questions should not be reviewed unless the case involves some minimum level of immediacy.<sup>465</sup> That view was silently rejected when first made after the 1980 reforms,<sup>466</sup> and has never gained acceptance since. In practice, the Court reviews the majority of certified questions properly brought for review by the parties, even some of relatively minor importance. A large number, however, often are summarily disposed of, and the Court has shown no unwillingness to brand a certified question "irrelevant."<sup>467</sup>

The decision to certify falls within the absolute discretion of the district court,<sup>468</sup> and thus cannot be required or undone by the Florida Supreme

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462. See FLA. CONST. art. V, § 3(b)(4).

463. See *Jurisdiction*, *supra* note 320, at 191-92.

464. FLA. R. APP. P. 9.030 (1980 amendment committee notes).

465. *Department of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735, 736-37 (Fla. 1981) (England, J., dissenting as to jurisdiction).

466. *Id.* (majority opinion).

467. *Fawcett v. State*, 615 So. 2d 691, 692 (Fla. 1993).

468. *Rupp v. Jackson*, 238 So. 2d 86, 89 (Fla. 1970).

Court. Jurisdiction over cases in this subcategory is absolutely dependent on the act of certification by a district court, which operates as a condition precedent. Once the case is certified, the condition precedent has been fully met, and no review or redetermination of the point is necessary or proper.<sup>469</sup>

As a corollary, the failure to certify a question creates a binding presumption that the case does *not* pass upon a matter amenable to this type of review. Thus, once a district court opinion becomes final and is not subject to rehearing or to clarification, the time has passed for a question to be certified.<sup>470</sup> Any purported certification occurring thereafter presumably would be treated as a nullity. However, the Florida Supreme Court has indicated that "any interested person" can ask for a certification by the district court at any time before the opinion becomes final.<sup>471</sup>

Nevertheless, certification does not create mandatory jurisdiction. The Florida Supreme Court has discretion to decline review, such as where the question is irrelevant, or where answering it would serve no purpose.<sup>472</sup> On occasion, the Court also seems to have declined to answer questions it regarded as too insignificant.<sup>473</sup> However, the Court has announced that jurisdiction is "particularly applicable" to cases of first impression,<sup>474</sup> perhaps implying a greater presumption that review should be granted.

Under the pre-1980 constitution, the common practice for many years was for the district courts simply to certify the case without actually framing a question. Later, the Florida Supreme Court urged the district courts to state the question being posed,<sup>475</sup> though there has never been an absolute requirement to this effect.<sup>476</sup> Framing the question now has become the most common practice,<sup>477</sup> though the district courts sometime still resort to the earlier habit of leaving the question unstated. When questions actually are framed, the Court sometimes rephrases them in a manner that better suits the purposes of review.<sup>478</sup>

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469. *Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832, 834-35 (Fla. 1959).

470. *Whitaker v. Jacksonville Expressway Auth.*, 131 So. 2d 22, 24 (Fla. 1961).

471. *Id.*

472. *Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961).

473. *Stein v. Darby*, 134 So. 2d 232, 237 (Fla. 1961).

474. *Duggan v. Tomlinson*, 174 So. 2d 393, 393 (Fla. 1965).

475. *Id.* at 394.

476. *E.g., Rupp*, 238 So. 2d at 89.

477. *See, e.g., Reed v. State*, 470 So. 2d 1382, 1383 (Fla. 1985) (quoting question as framed); *Holly v. Auld*, 450 So. 2d 217, 218 (Fla. 1984) (quoting question as framed).

478. *E.g., Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993).

When the question is left unframed, the Florida Supreme Court sometimes proceeds to discuss the issue without actually framing it.<sup>479</sup> At other times, the Court will frame the question at the start of an opinion, though occasionally it may not be entirely clear what the question is.<sup>480</sup> One case was accepted for review even though the district court had issued its opinion as a summary PCA and then certified the "question."<sup>481</sup> This prompted an exasperated dissent from one justice who argued that the Court should decline to review PCAs, even if certified, because the unstated "question" simply was not clear.<sup>482</sup>

There is a special problem that sometimes arises in cases involving certified questions: The losing party fails to seek Florida Supreme Court review. When this happens, the Court has ruled that the party who prevailed on the issue embodied in a certified question cannot seek review solely on that basis. In other words, the Court lacks jurisdiction of the case if the losing party on the certified question does not petition for review, unless some other basis of jurisdiction exists.<sup>483</sup>

Jurisdiction may also be lost over an otherwise valid certified question in another way. When a certified question is properly brought by the parties, they sometimes ask the Florida Supreme Court to relinquish jurisdiction to the district court for some reason.<sup>484</sup> In one such case, upon relinquishment, the district court granted rehearing and issued a new opinion that failed to include a certified question. The Florida Supreme Court dismissed the case when it came back for review, apparently for want of jurisdiction.<sup>485</sup>

## F. *Certified Conflict*

Discretionary review jurisdiction also exists when the district court certifies that its decision is in direct conflict with a decision of another district court of appeal.<sup>486</sup> This form of jurisdiction was created by the

479. *E.g.*, *Trushin v. State*, 425 So. 2d 1126, 1127-28 (Fla. 1982).

480. *See, e.g.*, *Radiation Technology, Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983).

481. *Id.* at 329.

482. *Id.* at 332-33 (Alderman, C.J., dissenting).

483. *See Petrik v. New Hampshire Ins. Co.*, 400 So. 2d 8, 9-10 (Fla. 1981); *Taggart Corp. v. Benzing*, 434 So. 2d 964, 966 (Fla. 4th Dist. Ct. App. 1983).

484. Relinquishment is governed by rule. *See* FLA. R. APP. P. 9.110, 9.600.

485. *State v. Smulowitz*, 486 So. 2d 587, 588 (Fla. 1986).

486. FLA. CONST. art. V, § 3(b)(4).



1980 constitutional reforms and had no earlier analogue.<sup>487</sup>

Case law on certified conflict has done little to illuminate its scope, though (with some early exceptions) the district court opinions accepted in this way almost uniformly meet two requirements: (1) they use the word "certify" or some variation of the root word "certif-"<sup>488</sup> in connection with the word "conflict;" and (2) they indicate a decision from another district court upon which the conflict is based. The Court sometimes has accepted jurisdiction even if some study of the district court opinion is needed to find the exact conflict case.<sup>489</sup>

The required use of the root word "certif-" has not arisen from decisional law but from the custom of the supreme court clerk's office,<sup>490</sup> which determines the category of jurisdiction before sending the case to the justices. Thus, strictly speaking, this form of jurisdiction effectively does not exist if conflict is merely "acknowledged," "recognized," "noted," or some other variation on the theme. With few exceptions,<sup>491</sup> all of these "acknowledged conflict" cases are treated as petitions for "express and direct" conflict, though many are accepted for review on that basis. The distinction between "acknowledged conflict" and "express conflict" can have an important consequence, however, because express and direct conflict is subject to more rigorous requirements.

In other words, to certify conflict properly, the district court must use the root word "certif-." This requirement may seem needlessly bureaucratic, but it serves a useful function. Any other rule would allow the categories of certified conflict and "express and direct" conflict to blur together. Thus, some "acknowledged" conflict cases might be accepted on one basis of jurisdiction while a similar case might not. The Clerk's bright-line rule avoids such arbitrariness.

Certified conflict cases differ in two important ways from the "express and direct" conflict subcategory, discussed above.<sup>492</sup> First, no briefing on

487. See *Jurisdiction*, *supra* note 320, at 193.

488. One district court used the words "certificate of direct conflict." *State v. Dodd*, 396 So. 2d 1205, 1208 n.7 (Fla. 3d Dist. Ct. App. 1981), *approved*, 419 So. 2d 333, 336 (Fla. 1982).

489. *E.g.*, *Hannewacker v. City of Jacksonville Beach*, 402 So. 2d 1294, 1296 (Fla. 1st Dist. Ct. App. 1981), *approved as modified*, 419 So. 2d 308, 312 (Fla. 1982).

490. The custom has not always been strictly followed. In one early case, the court accepted "certified conflict" solely because a citation PCA contained a "Contra" cite. See *Parker v. State*, 406 So. 2d 1089, 1090 (Fla. 1981), *rev'g* 386 So. 2d 1297, 1298 (Fla. 5th Dist. Ct. App. 1980). This practice has not been observed in recent years.

491. Some cases may slip through the initial review process.

492. See discussion *infra* part VI.D.

jurisdiction is permitted<sup>493</sup> because the cases are accepted routinely. Second, the Court has found discretion to hear them even if there is actually no conflict, something that cannot be done for express and direct conflict.<sup>494</sup> In one 1993 case, for example, the Florida Supreme Court reviewed a certified conflict but then harmonized the cases.<sup>495</sup> The policy for accepting such cases, of course, is that the very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court. In sum, review is easier to obtain for certified conflict than for “express and direct” conflict.

Finally, there is one important procedural fact that could deprive the Florida Supreme Court of jurisdiction even where conflict is properly certified. As with certified questions,<sup>496</sup> the party who prevailed on the “certified conflict” issue cannot seek review based on this form of jurisdiction. In other words, the Court lacks jurisdiction of the case if the losing party does not petition for review, except where some independent basis for jurisdiction exists.<sup>497</sup> This situation most often will arise when the party who prevailed on the conflict issue disagrees with some other aspect of the district court opinion.

### G. “Pass-Through” Jurisdiction

The next subcategory of discretionary review jurisdiction has been identified by the informal name “pass-through jurisdiction.”<sup>498</sup> It essentially is a variation of a certified question for very important and pressing cases. The principle feature is that the case “passes through” the district court without being heard and is sent directly to the Florida Supreme Court for immediate resolution. This substantially speeds the appellate process.<sup>499</sup>

The Florida Supreme Court can hear such cases only if: (1) an appeal is pending in the district court brought from a trial court’s order or judgment; (2) the district court certifies that the case is of great public

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493. FLA. R. APP. P. 9.120(d).

494. Actual conflict must exist in “express and direct” cases for the Court to have discretion to hear the case. See discussion *supra* part VI.D.1.

495. *Harmon v. Williams*, 615 So. 2d 681, 683 (Fla. 1993).

496. See *supra* text accompanying note 482.

497. See *Davis v. Mandau*, 410 So. 2d 915, 915 (Fla. 1981).

498. For an opinion using the informal name, see *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145, 1146 (Fla. 1985).

499. For a considerable history underlying the development of this form of jurisdiction, see *Jurisdiction*, *supra* note 320, at 193-96.

importance or may have great effect on the proper administration of justice throughout the state; and, (3) the district court certifies that immediate resolution by the Florida Supreme Court is required.<sup>500</sup> Certification can occur on the district court's own motion, or at the suggestion of a party if done within ten days of appealing to the district court.<sup>501</sup>

While the three elements above appear mandatory from the constitutional language, the Florida Supreme Court has been lenient in accepting district court certifications fairly susceptible of meeting the requirements. The root word "certif-" probably should be used by the district court, but it is doubtful that a case of obvious importance would be refused for failure to do so. The policy reasons for requiring a term of art in certified conflict cases do not exist here.<sup>502</sup> Typically, the district courts scrupulously meet the certification requirement.<sup>503</sup>

The Florida Supreme Court's jurisdiction over pass-through cases attaches immediately on rendition<sup>504</sup> of the district court order certifying the case.<sup>505</sup> Thus, the district court loses jurisdiction at that point unless the Florida Supreme Court relinquishes its jurisdiction.<sup>506</sup> In theory, a defective certification would not actually divest the district court of jurisdiction nor vest the supreme court with jurisdiction. For that reason, the parties and the district court should pay some attention to insure that certification is done properly.

500. FLA. CONST. art. V, § 3(b)(5).

501. FLA. R. APP. P. 9.125(a). The method of making and filing a "suggestion" is heavily regulated by rule. See FLA. R. APP. P. 9.125(c)-(f).

502. See *supra* text accompanying notes 436-40 for policy reasons which require a term of art in certified conflict cases. "Acknowledged" conflict cases can be "mopped up" by the "express and direct" category. There is no other category to "mop up" pass-through cases in which the district court failed to use the root word "certif-."

503. In the "Baby Theresa" case, for example, the Fourth District Court of Appeal issued the following certificate:

We hereby certify to the Florida Supreme Court that the order of the trial court of March 27, 1992, requires immediate resolution by the Supreme Court, because it rules on an issue of great public importance and because the relief sought in the trial court may be mooted by the natural death of the infant child of appellants.

*In re* Pearson, Case No. 92-0942 (Fla. 4th Dist. Ct. App., March 30, 1992) (unpublished order).

504. Rendition occurs when a signed, written order is filed with the clerk of the lower tribunal, subject to a few exceptions usually not applicable in these cases. See FLA. R. APP. P. 9.020(g).

505. FLA. R. APP. P. 9.125(g).

506. Relinquishment is governed by rule. See FLA. R. APP. P. 9.110, 9.600.

There is no requirement that the district court frame a question, although a minority of the courts do so.<sup>507</sup> Framing a question may be useful, but these cases almost always involve questions that are apparent to everyone. Where a question is framed, the Florida Supreme Court usually quotes it.<sup>508</sup> If no question is framed, the Court sometimes states the issue to be reviewed<sup>509</sup> and sometimes does not.<sup>510</sup> In any event, the presence or absence of a framed question makes no difference, though it can serve a useful purpose when the parties disagree on the exact nature of the question being decided.<sup>511</sup>

Pass-through cases fall within the Court's discretionary jurisdiction and theoretically could be refused. In practice, the cases are always heard, frequently (but not always), on an expedited basis. The Court once admonished the district courts not to use pass-through jurisdiction "as a device for avoiding difficult issues by passing them through to this Court."<sup>512</sup> This hints that jurisdiction might be declined if pass-through was abused, but on the whole, the cases certified in this manner genuinely are pressing. These cases most commonly involve urgent questions of governmental authority,<sup>513</sup> constitutional rights that could be undermined if the case is not expedited,<sup>514</sup> or personal liberties that could be jeopard-

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507. See, e.g., *Department of Corrections v. Florida Nurses Ass'n*, 508 So. 2d 317, 317 (Fla. 1987); *Division of Pari-Mutuel Wagering v. Florida Horse Council, Inc.*, 464 So. 2d 128, 129 (Fla. 1985).

508. See, e.g., *Department of Corrections*, 508 So. 2d at 317.

509. E.g., *In re T.A.C.P.*, 609 So. 2d 588, 589 (Fla. 1992).

510. *Chiles v. United Faculty of Fla.*, 615 So. 2d 671 (Fla. 1993).

511. For example, *In re T.A.C.P.* presented a situation in which some parties and *amici curiae* not only disagreed about the nature of a relevant medical syndrome (anencephaly), but also framed the issues in widely differing ways. 609 So. 2d at 589. Some saw the issue as whether organs could be "harvested" from a living child, while others saw the issue as whether there was a right of privacy in deciding what would happen to the body of a child who was, for all intents and purposes, dead. *Id.* When the court framed the issue at the start of the opinion, it signaled the true scope of what was being decided. *Id.* at 589.

512. *Carawan v. State*, 515 So. 2d 161, 162 n.1 (Fla. 1987). The district court in *Carawan* had declined to rule on the case because it found that the applicable law had become "curiouser and curiouser." *Id.* at 163.

513. E.g., *Chiles*, 615 So. 2d at 671 (constitutionality of legislature abrogating state employees' collective bargaining agreement).

514. *State v. Dodd*, 561 So. 2d 263 (Fla. 1990) (constitutionality of statute restricting political contributions when election was nearing).

dized by a lengthy appeal.<sup>515</sup> With rare exceptions,<sup>516</sup> all these cases involve a significant level of immediacy.

#### H. *Questions Certified by Federal Appellate Courts*

The final subcategory of discretionary review jurisdiction is cases involving a question of law certified by the *federal* appellate courts. Jurisdiction is allowed here only if: (1) the United States Supreme Court or a federal court of appeals certifies a question; (2) the question is determinative of "the cause;" and, (3) there is no controlling precedent of the Florida Supreme Court.<sup>517</sup> This language is mandatory, and therefore, all three elements must be present. By rule, the federal court is required to issue a "certificate" containing the style of the case, a statement of the facts showing the nature of the cause and the circumstances from which the questions of law arose, and the questions to be answered. The certificate must be certified to the Florida Supreme Court by the federal court clerk.<sup>518</sup>

The jurisdiction granted here was not a part of the pre-1980 constitution. However, much the same process had arisen earlier by court rule and from decisional law.<sup>519</sup> Thus, the 1980 reforms largely codified these procedures within the constitution.<sup>520</sup>

Perhaps the most significant requirement, other than the detailed formal certificate,<sup>521</sup> is that there must be a "cause" from which the certified questions arise.<sup>522</sup> This means that the Florida Supreme Court cannot accept questions in the abstract, but only if they are "determinative" of a particular case. In practice, this means that there must be an actual suit pending review in the federal appellate courts. Thus, certified questions do not actually ask the Florida Supreme Court to issue an advisory opinion. The federal courts are bound to honor and to apply the response given by the Florida Supreme Court. All such cases involve an actual application of Florida law, often in cases premised on federal diversity jurisdiction.<sup>523</sup>

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515. *In re T.A.C.P.*, 609 So. 2d at 588 (right to donate organs of child soon to die, where death would make organs undonatable).

516. *See, e.g., Carawan*, 515 So. 2d at 161.

517. FLA. CONST. art. V, § 3(b)(6).

518. FLA. R. APP. P. 9.150(b).

519. *E.g., Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969).

520. *See Jurisdiction, supra* note 320, at 196.

521. For an example of a certificate see *Aldrich v. Aldrich*, 375 U.S. 249 (1963).

522. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741 (Fla. 1961).

523. *E.g., Allen v. Estate of Carman*, 486 F.2d 490, 492 (5th Cir. 1973).

Certified questions accepted from federal courts are answered by way of a formal opinion, a requirement that stems in part from state statute.<sup>524</sup> The holdings of that opinion can become precedent for future cases, on the theory that the Florida Supreme Court's opinion actually resolves controlling questions. In answering the questions, however, the Court does not "remand"<sup>525</sup> the cause to a federal court as it would to an inferior court. Some Florida Supreme Court opinions misuse the word "remand" in this way, but the better practice is for the Court to "transmit" or "return" the cause to the federal court for further proceedings.<sup>526</sup>

The Court has obvious discretion to decline to answer a federal certified question. However, in practice, the federal appellate courts have been conscientious in confining certification to cases that genuinely meet the rather strict constitutional requirements. Review might be declined, for example, where a federal appellate court was unaware that there is controlling precedent previously made by the Florida Supreme Court. In that situation, the most constructive response would be for the Court to cite the controlling precedent in the order declining review.<sup>527</sup>

## VII. DISCRETIONARY ORIGINAL JURISDICTION

The Florida Supreme Court's discretionary original jurisdiction involves a class of legal "writs" that, with some exceptions, originated centuries ago in the English common law. Most Floridians know little about these writs, with the possible exception of habeas corpus, and even some lawyers tend to lose sight of the creative ways the writs can be used. In truly exceptional circumstances, one of these so-called "extraordinary writs" may provide jurisdiction when nothing else can.

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524. FLA. STAT. § 25.031 (1991). There is no requirement to accept the case, only to issue an opinion once the case is accepted. *Id.*

525. The term "remand" implies mandate and therefore suggests a direction to an inferior court. *See* BLACK'S LAW DICTIONARY 1293 (6th ed. 1991). The federal appellate courts are not inferior to the Florida Supreme Court.

526. *E.g.*, *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1270 (Fla. 1987); *Bates v. Cook, Inc.*, 509 So. 2d 1112, 1115 (Fla. 1987).

527. The court probably would lack jurisdiction, not merely discretion, in this situation. The constitution's strict language suggests that it is not enough for the federal appellate court to certify the case; there also must be an actual lack of controlling precedent of the Florida Supreme Court. FLA. CONST. art. V, § 3(b)(6). In any event, whether the case was dismissed for lack of jurisdiction or lack of discretion would make no difference here.

Because most of the writs are ancient, there is a highly detailed body of case law governing their use. The constitution itself does little more than identify the writs and assign the court jurisdiction over them,<sup>528</sup> so the Florida Supreme Court almost always gauges these cases based on long-standing judicial precedent. As a result, these cases tend to be analyzed under a kind of “common law” approach, although, strictly speaking, the jurisdiction arises from the constitution itself. There are some limitations imposed by the constitution that did not arise from the common law, but these usually involve the specific class of persons to whom a writ may be issued by the Court.

Technically speaking, the Florida Supreme Court has jurisdiction over any petition that merely requests some form of relief available under this category. The Court’s discretion, however, is severely limited in some cases by the body of case law and common law principles defining the scope of permissible judicial action. The “jurisdiction/discretion” distinction is usually of little real consequence here. If the Court lacks discretion to issue a writ, it cannot grant relief as surely as if it lacked jurisdiction.

Nevertheless, there are aspects of the controlling case law that can be explained only by the distinction. For example, the Court’s discretion to issue any of the extraordinary writs is defined by the applicable standard of review, which differs with each writ. It is common (though not precise) to use the word “jurisdiction” in its loose sense to include limitations on discretion, in which case the Court’s “jurisdiction” over the extraordinary writs also would be determined by the standard of review.

However, there are cases where the Court expressly accepts jurisdiction, hears the case, and issues a full opinion determining that the standard of review has not been met and a writ cannot be issued.<sup>529</sup> If the Court lacked *jurisdiction* of such cases, then it could not even hear them, much less accept jurisdiction and issue a full opinion.

There is another aspect of “discretion” that deserves some mention. The fact that the Court’s discretion to issue the writs is limited by judicially created case law leaves open the possibility of the Florida Supreme Court refining or modifying the standards of review. Such modifications are

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528. In many instances, however, jurisdiction is not exclusive. The lower courts would also have jurisdiction to consider issuing one of the writs, except that petitioners usually are forbidden to seek the same remedy from another court simply because they did not like the last court’s decision.

529. *E.g.*, *Florida League of Cities v. Smith*, 607 So. 2d 397, 398, 400-01 (Fla. 1992).

unusual, but they do happen.<sup>530</sup> It would be hard to say in these cases that the Court somehow has modified its own “jurisdiction,” because this would imply some inherent power to depart from the constitution. On the whole, the infrequent modifications made to standards of review are best understood as changes in discretion, not changes in jurisdiction.<sup>531</sup>

### A. *Mandamus*

The first extraordinary writ is “mandamus,” whose name in Latin means “We command.”<sup>532</sup> As the name suggests, mandamus is a writ of commandment, a fact underscored by its history. In ancient times, the writ issued as a command from the Sovereigns of England when they sat personally as judges; but, it later came to be a prerogative of judges of the Court of King’s Bench.<sup>533</sup> Because of the writ’s coercive nature, its use is subject to severe restrictions developed in Florida and earlier English case law. In broad terms, the Florida Supreme Court today may issue mandamus only to compel state officers and state agencies to perform a purely ministerial action where the petitioner otherwise would suffer an injury and has a clear and certain right to have the action done. There are a number of concerns here.

In the Florida Supreme Court, unlike other state courts, mandamus may issue only to state officers and state agencies.<sup>534</sup> This limitation arises from the constitution itself, and is the only restriction on mandamus expressly imposed there.<sup>535</sup> The Court has never fully defined what the terms “state officers” and “state agencies” mean. The cases appear to assume that these terms include agencies and public office holders within the three branches of state government, but nothing establishes this with any finality. Arguably, state officers could include persons holding an office

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530. *E.g.*, *Jones v. State*, 591 So. 2d 911, 913 (Fla. 1991) (modifying *error coram nobis*); *Richardson v. State*, 546 So. 2d 1037, 1039 (Fla. 1989) (modifying *error coram nobis*).

531. In theory, modifications to “discretion” could be so drastic as to essentially constitute a change in jurisdiction. In practice, it is unlikely the court would take any such drastic step, which probably would invite efforts to curb the court’s actions by way of statute or constitutional amendment.

532. BLACK’S LAW DICTIONARY 961 (6th ed. 1991).

533. *See State ex rel. State Live Stock Sanitary Bd. v. Graddick*, 89 So. 361, 362 (Fla. 1921).

534. Thus, the Florida Supreme Court presently cannot issue a writ of mandamus to private individuals or businesses, as it sometimes could in the past. *See, e.g.*, *State ex rel. Ranger Realty Co. v. Lummus*, 149 So. 650 (Fla. 1933).

535. FLA. CONST. art. V, § 3(b)(8).



created by the Florida Constitution,<sup>536</sup> but the Court has never clearly said so. Moreover, the constitution itself seems to contrast “state officers” with “constitutional officers” elsewhere, implying they are not the same thing.<sup>537</sup>

Someone seeking mandamus also must establish that the action being sought is “ministerial.” An action is ministerial only to the extent that the respondent has no discretion over the matter. There are self-evident reasons for this requirement. No court can compel that lawful discretion be exercised to achieve a particular result, however fair it may seem to do so.<sup>538</sup> Any other rule would permit judges to exercise dictatorial powers through the simple expedient of mandamus. Thus, a respondent’s lack of discretion is an absolute prerequisite to mandamus.

However, the lack of discretion can be partial because it is possible for an action to be partly ministerial and partly discretionary. This most commonly arises where the law grants discretion to take some action but specifies a particular kind of review process and factors that must be considered when and if discretion is exercised. Sometimes a respondent may depart from the required process. When so, mandamus can issue only to require a proper review, not to mandate that any particular discretionary outcome must be reached.

Thus, the Court has held that mandamus cannot compel the discretionary act of granting parole to an inmate; yet, mandamus potentially could be used to compel the Florida Parole and Probation Commission to conform its parole review process to the clear requirements of the constitution.<sup>539</sup> Likewise, mandamus cannot be used to compel the Florida Department of Corrections to perform the discretionary act of awarding “early release” credits to inmates; yet mandamus can be used to require the Department to employ a constitutionally required process in review of such cases.<sup>540</sup>

The person seeking mandamus also must show the likelihood that some injury will occur if the writ is not issued.<sup>541</sup> If there is no possibility of injury, then mandamus is an inappropriate remedy.<sup>542</sup> Thus, mandamus

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536. Examples include sheriffs, clerks of the circuit court, and property appraisers. *See* FLA. CONST. art. VIII, § 1(d).

537. *See* FLA. CONST. art. V, § 3(b)(3).

538. *E.g.*, *Moore v. Florida Parole & Probation Comm’n*, 289 So. 2d 719 (Fla. 1974).

539. *Id.* at 719-20.

540. *Waldrup v. Dugger*, 562 So. 2d 687, 694 (Fla. 1990).

541. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992).

542. *Id.*

will not be issued if doing so would constitute a useless act<sup>543</sup> or would result in no remedial good.<sup>544</sup> This situation might exist, for example, where the action that would be compelled already has been done.<sup>545</sup>

For example, the Court has found the writ inappropriate where a license was taken away improperly but had been obtained in the first instance through fraud or deceit.<sup>546</sup> In other words, a valid reason existed to revoke the license, and, therefore, it would be a useless act to issue mandamus merely because an improper reason had been given for revocation. Moreover, injury does not exist if petitioners are able to perform the ministerial acts in question for themselves.<sup>547</sup> However, injury can include some generalized harm, such as a disruption of governmental functions<sup>548</sup> or the holding of an illegal election.<sup>549</sup>

Petitioners seeking mandamus also must establish that they have a "clear and certain" right imposing a corresponding duty on the respondents to take the actions sought.<sup>550</sup> A right is clear and certain only if it is already plainly established in preexisting law or precedent.<sup>551</sup> Thus, the opinion in which mandamus will be issued cannot be used as the vehicle for creating a right previously uncertain or not yet extended to the situation at hand. The right already must have come into existence through some other legal authority.<sup>552</sup> Moreover, the right must be "complete" and unconditional at the time the petition is brought. The existence of any unfulfilled condition precedent renders mandamus improper.<sup>553</sup> Likewise, mandamus cannot be used to achieve an illegal or otherwise improper purpose, because there is no right to break the law or violate public policy.<sup>554</sup>

On occasion, Florida courts imposed another element which a petitioner had to show the existence of no other adequate remedy.<sup>555</sup> This was

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543. *E.g.*, *Bishoff v. State ex rel. Tampa Waterworks Co.*, 30 So. 808, 812 (Fla. 1901).

544. *E.g.*, *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420, 421 (Fla. 1944).

545. *E.g.*, *State ex rel. Fidelity & Casualty Co. v. Atkinson*, 149 So. 29, 30 (Fla. 1933).

546. *State ex rel. Bergin v. Dunne*, 71 So. 2d 746, 749 (Fla. 1954).

547. *E.g.*, *Gallie v. Wainwright*, 362 So. 2d 936 (Fla. 1978).

548. *E.g.*, *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971).

549. *See supra* note 529.

550. *State ex rel. Eichenbaum v. Cochran*, 114 So. 2d 797, 800 (Fla. 1959).

551. *Florida League of Cities*, 607 So. 2d at 401.

552. *Id.*

553. *State ex rel. Bergin*, 71 So. 2d at 749.

554. *See, e.g.*, *State ex rel. Edwards v. County Comm'rs of Sumter County*, 22 Fla. 1, 7 (1886).

555. *E.g.*, *Shevin ex rel. State v. Public Serv. Comm'n*, 333 So. 2d 9, 12 (Fla. 1976); *State ex rel. Long v. Carey*, 164 So. 199, 205 (Fla. 1935).

justified on the grounds that mandamus exists to correct defects in justice, not to supersede other adequate legal remedies. The extraordinary nature of the writ supports this rationale. However, in 1985, the Florida Supreme Court seemed to indicate that the “no adequate remedy” requirement no longer exists, at least in cases involving “strictly legal constitutional” questions.<sup>556</sup>

The reasons for this conclusion are not clear, nor is the validity of the result certain. The opinion making these statements obviously misread the precedent on which it relied<sup>557</sup> and could be criticized or overruled on that basis. The “no adequate remedy” serves a useful purpose in that it requires petitioners to exhaust other sufficient means before burdening the Florida Supreme Court’s docket. Possibly the Court may see fit to reinstate the requirement at some point. In any event, the writ of mandamus remains discretionary and can be refused without reason if the Court believes a petitioner has another good remedy.

The terms “state officers and state agencies” as used in the constitution include judges and courts,<sup>558</sup> though the Florida Supreme Court generally seems to confine its “judicial” mandamus cases to petitions directed at the district courts of appeal. In these cases, one specialized use of the writ is to require the respondent-judges to exercise jurisdiction that has been wrongly denied in the lower court. At earlier common law, this device was known as the writ of *procedendo*,<sup>559</sup> though today the same concept has been subsumed under mandamus.<sup>560</sup> However, mandamus would be inappropriate unless the law clearly required the lower court to exercise its jurisdiction and it failed to do so.<sup>561</sup>

556. *Hess v. Metropolitan Dade County*, 467 So. 2d 297, 298 (Fla. 1985). *Contra* *Department of Health and Rehabilitative Servs. v. Hartsfield*, 399 So. 2d 1019, 1020 (Fla. 1st Dist. Ct. App. 1981).

557. The court cited *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984), which involved an alleged defect in a constitutional amendment that would be put to voters. *Fine* did not mention the “no adequate remedy” requirement. However, it was clear that no other adequate remedy existed there: The right to a fair election was at stake, and a fair election would not be possible if a defective constitutional amendment was allowed to remain on the ballot. *Id.* at 985. Moreover, there was precedent that the defects in the proposed amendment would be “cured” by the act of being approved in the election, unfair though it may be.

558. *See* FLA. CONST. art. V, § 3.

559. *See* *Linning v. Duncan*, 169 So. 2d 862, 866 (Fla. 1964) (citing *Newport v. Culbreath*, 162 So. 340 (Fla. 1935)).

560. *E.g.*, *Pino v. District Court of Appeal*, 604 So. 2d 1232 (Fla. 1992).

561. *Id.*

Finally, the Florida Supreme Court has a long-standing custom—but one not uniformly followed—regarding the actual issuance of mandamus. As a matter of courtesy, the Court sometimes says it will withhold issuing the writ because the justices are confident a respondent will conform to the majority opinion.<sup>562</sup> The practice is a sound one, if only because it may blunt some of the sting the losing party may feel. In any event, if a respondent later refused to conform, the Court could still issue a previously “withheld” writ on a proper motion to enforce the mandate. The fact that a writ is actually issued, however, never indicates any special onus.

## B. *Quo Warranto*

The second extraordinary writ is *quo warranto*, whose name in Latin poses the question, “By what right?” As the name suggests, *quo warranto* is a writ of inquiry. Historically, the Crown of England developed the writ as a means of calling upon subjects to explain some alleged abuse of an office, franchise, or liberty within the Crown’s purview.<sup>563</sup> Today, *quo warranto* continues in Florida as the means by which an interested party can test whether any individual improperly claims or has usurped some power or right derived from the State of Florida.<sup>564</sup>

Standing to seek *quo warranto* can be inclusive. The Florida Supreme Court has held that any citizen may bring suit for *quo warranto* if the case involves “enforcement of a public right.”<sup>565</sup> In practice, *quo warranto* proceedings almost always involve a public right because the Florida Supreme Court can issue the writ only to “state officers or state agencies.”<sup>566</sup> (This limitation is the only express restriction imposed by the constitution, all others being derived from case law.) Thus, the cases taken to the Court usually are limited to those involving some allegedly improper use of state powers or violation of rights by these officers or agencies.

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562. *E.g.*, *Caldwell v. Estate of McDowell*, 507 So. 2d 607, 608 (Fla. 1987).

563. *State ex rel. Watkins v. Fernandez*, 143 So. 638 (Fla. 1932).

564. *Id.*; *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989).

565. *Martinez*, 545 So. 2d at 1339 (citing *State ex rel. Pooser v. Wester*, 170 So. 736, 737 (Fla. 1936)).

566. FLA. CONST. art. V, § 3(b)(8). For a discussion of this limitation and its likely meaning, see *supra* text accompanying notes 534-37. Under earlier law, *quo warranto* sometimes could be used to test the validity of actions done pursuant to a franchise granted by the state, including the right to incorporate. Thus, the writ sometimes could issue against a private concern. *E.g.*, *Davidson v. State*, 20 Fla. 784 (1884). The Florida Supreme Court no longer has such authority. See FLA. CONST. art. V, § 3(b)(8).

One use of *quo warranto* is to test the outcome of a disputed election, such as where one person has claimed the powers of the elective office but another contends this was unlawful.<sup>567</sup> Actions of this variety are governed in part by Florida Statutes specifying that the petition be brought by the Attorney General or, if the latter refuses, by the person claiming title to the office.<sup>568</sup> If the Court grants the petition, it can issue a judgment of ouster<sup>569</sup> which has the effect of vesting the claimant with title to the office. However, if the Attorney General did not consent to the suit, the judgment remains subject to challenge by the state.<sup>570</sup>

There are other uses of *quo warranto*. For example, *quo warranto* has been used by a legislator who argued that the Governor exceeded his constitutional authority in calling a special session of the Legislature.<sup>571</sup> In that instance, the petition for *quo warranto* was filed by the legislator as an original proceeding in the Court.<sup>572</sup> The writ has also been used to decide whether a state public defender's office exceeded its statutory authority by representing indigent clients in federal court proceedings.<sup>573</sup> As in the case of mandamus, the Florida Supreme Court sometimes has "withheld" issuance of a writ of *quo warranto* as a matter of courtesy where it appears the Court's decision will be honored.<sup>574</sup> This custom has not been followed uniformly, however, and the failure to withhold issuance has no real significance. In any event, *quo warranto* is a somewhat exotic legal device that is used only occasionally by the Court.

### C. Writs of Prohibition

The third extraordinary writ is that of prohibition. Like the two writs discussed above, the writ of prohibition has an ancient origin in English law. It arose out of the early struggle between the royal courts controlled by the Crown and the ecclesiastical courts controlled by the Church. Its primary purpose was to prevent an ecclesiastical court from encroaching upon the

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567. State *ex rel.* Gibbs v. Bloodworth, 184 So. 1 (Fla. 1938).

568. FLA. STAT. § 80.01 (1991).

569. *Id.* § 80.032.

570. *Id.* § 80.04.

571. *Martinez*, 545 So. 2d at 1338.

572. *Id.*

573. State *ex rel.* Smith v. Jorandby, 498 So. 2d 948 (Fla. 1986).

574. *E.g., id.* at 950; *Greenbaum v. Firestone*, 455 So. 2d 368, 370 (Fla. 1984).

prerogatives of the Sovereign.<sup>575</sup> Thus, the writ of prohibition came into being as a preventive writ and retains that quality to this day.

In Florida, prohibition is now the process by which a higher court prevents an inferior tribunal from exceeding its jurisdiction.<sup>576</sup> The writ may be obtained only by a petitioner who can demonstrate that a lower court is without jurisdiction or is attempting to act in excess of jurisdiction regarding a future matter, and the petitioner has no other adequate legal remedy to prevent an injury that is likely to result.<sup>577</sup> There are a number of concerns here.

The writ may only be directed to a lower court and not to state agencies, state officers, or state commissions. This restriction is imposed by the constitution<sup>578</sup> as a result of the 1980 jurisdictional reforms, which deleted the Florida Supreme Court's authority to issue writs of prohibition to some quasi-judicial commissions.<sup>579</sup> In effect, this ended the Court's earlier jurisdiction over state administrative agencies when they acted in their quasi-judicial capacities.<sup>580</sup> Under long-standing precedent, writs of prohibition clearly cannot reach an action that is purely legislative or executive in nature.<sup>581</sup>

However, the Florida Supreme Court's power to issue writs of prohibition to courts is now the same for both the district courts<sup>582</sup> and the circuit courts.<sup>583</sup> Prior to the 1980 reforms, the authority over trial courts had been limited to "causes within the jurisdiction of the supreme court to review."<sup>584</sup> The restriction was deleted in 1980, effectively vesting the Florida Supreme Court with potential prohibition jurisdiction over any cause arising in a trial court.<sup>585</sup> Presumably, this includes the county courts, though in practice such cases will seldom involve matters of such gravity for the Court to exercise its discretion.

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575. *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977).

576. *Id.*

577. *Id.* at 296-97; *accord Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986).

578. FLA. CONST. art. V, § 3(b)(7).

579. *Moffit v. Willis*, 459 So. 2d 1018, 1020 (Fla. 1984).

580. For an example of this superseded form of jurisdiction, see *State ex rel. Vining v. Florida Real Estate Comm'n*, 281 So. 2d 487 (Fla. 1973) (prohibition issued against quasi-judicial proceedings of Florida Real Estate Commission).

581. *State ex rel. Swearingen v. Railroad Comm'rs*, 84 So. 444 (1920).

582. *See, e.g., Peltz v. District Court of Appeal*, 605 So. 2d 865 (Fla. 1992).

583. *See, e.g., Department of Agric. v. Bonanno*, 568 So. 2d 24 (Fla. 1990).

584. ARTHUR J. ENGLAND, JR., ET AL., *FLORIDA APPELLATE PRACTICE MANUAL* § 2.23(a), at 57 (D & S/Butterworths 1992 Supp.).

585. *Id.*

Petitioners must also show that the lower court is without jurisdiction or is attempting to act in excess of jurisdiction. For example, prohibition is proper to restrain a lower court that clearly lacks jurisdiction over the subject matter.<sup>586</sup> The Florida Supreme Court often has contrasted “lack of jurisdiction” with those situations in which a court merely exercises jurisdiction erroneously. In theory, a writ of prohibition is not proper for the latter.<sup>587</sup> In practice, however, there is no realistic way to draw a clear distinction between the lack of jurisdiction and the erroneous exercise of jurisdiction as the two often blur together.

Perhaps as a result, the case law often reaches results that seem hard to reconcile with a strict “lack of jurisdiction” element. In several cases, for example, the Florida Supreme Court has used prohibition to prevent a lower court from imposing restraints on a prosecutor’s discretion to seek the death penalty in a criminal trial. This has occurred even though the lower court plainly had jurisdiction over the issues but had merely engaged in conduct best characterized as a clear error.<sup>588</sup>

On policy grounds, such a use of prohibition has some merit. It could promote judicial economy by allowing the Florida Supreme Court to prevent a clear error from infecting the entire proceeding. This would forestall the likelihood of a useless trial that must inevitably be reversed on appeal. Nevertheless, such a rule comes close to vesting the Court with a kind of interlocutory appellate jurisdiction, which could become onerous if not used with restraint. As a practical matter, it seems unlikely the Court will extend this particular use of prohibition much beyond the unusual factual pattern from which it arose.

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586. *Crill v. State Rd. Dep’t*, 117 So. 795 (Fla. 1928).

587. *English*, 348 So. 2d at 297.

588. *E.g.*, *State v. Donner*, 500 So. 2d 532 (Fla. 1987); *State v. Bloom*, 497 So. 2d 2 (Fla. 1986). *But see* *Peacock v. Miller*, 166 So. 212 (Fla. 1936) (prohibition not proper where inferior court has jurisdiction but commits error). The use of prohibition in the prosecutorial discretion cases following the 1980 jurisdiction reforms apparently began with *Bloom*, which cited as authority *Cleveland v. State*, 417 So. 2d 653 (Fla. 1982). However, this is an obvious overextension of *Cleveland*, which was an “express and direct conflict” case holding only that a court could not interfere with a prosecutor’s discretion to refuse to allow a defendant to be placed in a pretrial intervention program. *Id.* *Cleveland* had nothing to do with prohibition. Nevertheless, the “abuse of discretion” cases do gain some support by analogy to the well established precedent that prohibition sometimes may be used as a means of disqualifying biased judges even though they clearly have jurisdiction. *E.g.*, *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978); *State ex rel. Bank of Am. v. Rowe*, 118 So. 5 (Fla. 1928). Judicial disqualification comes much closer to being a question of abuse of discretion than abuse of jurisdiction.

The next element a petitioner must show in order to obtain a prohibition writ is that the alleged improper actions of the lower court will occur in the future.<sup>589</sup> The Florida Supreme Court often has noted that prohibition is a preventive writ, not a "corrective" one.<sup>590</sup> Thus, prohibition can be directed only to future acts, not past ones. The cases suggest that the future act must to some degree be "impending."<sup>591</sup> "Past acts" can include an order already entered or proceedings already completed.<sup>592</sup> Additionally, prohibition has been allowed for orders previously entered if the primary effect is on a proceeding that has not yet occurred.<sup>593</sup> This use is justifiable in that such orders are directed to the future, but the result is a blurring of the distinction. The best interpretation probably is that a "past act" is one involving a significant degree of finality, whereas a "future act" does not.

To obtain prohibition, a petitioner must also show that no other adequate remedy exists.<sup>594</sup> The key word is "adequate." Other remedies may exist that are inadequate, incomplete, or unavailable to the petitioner; if so, then prohibition is not foreclosed.<sup>595</sup> As a general rule, the fact that an appeal will give the petitioner an adequate and complete remedy renders prohibition unavailable.<sup>596</sup> If another extraordinary writ provides an adequate and complete remedy, then prohibition also should be denied.<sup>597</sup> However, the Court still might review the case by treating the petition as though it had requested the proper remedy.<sup>598</sup>

The final element is that prohibition can be issued only to prevent some likely and impending injury.<sup>599</sup> Prohibition is not available if the issues have become moot by the passage of time,<sup>600</sup> nor can it be used to issue a purely advisory opinion establishing principles for future cases.<sup>601</sup> Opinions discussing the writ often describe it as being appropriate only in

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589. *English*, 348 So. 2d at 296.

590. *E.g.*, *Sparkman*, 498 So. 2d at 895.

591. *E.g.*, *Joughin v. Parks*, 143 So. 145 (Fla. 1932).

592. *Id.*

593. *E.g.*, *Donner*, 500 So. 2d at 532; *Bloom*, 497 So. 2d at 2.

594. *English*, 348 So. 2d at 297.

595. *E.g.*, *Sparkman*, 498 So. 2d at 892; *Curtis v. Albritton*, 132 So. 677 (Fla. 1931).

596. *Sparkman*, 498 So. 2d at 892.

597. *E.g.*, *State ex rel. Placeres v. Parks*, 163 So. 89 (Fla. 1935) (if mandamus is available, prohibition should be denied); *State ex rel. Booth v. Byington*, 168 So. 2d 164 (Fla. 1st Dist. Ct. App. 1964) (if *quo warranto* is available, prohibition should be denied).

598. *See, e.g.*, *Waldrup v. Dugger*, 562 So. 2d 687 (Fla. 1990).

599. *English*, 348 So. 2d at 297.

600. *Wetherell v. Thursby*, 129 So. 345 (Fla. 1930).

601. *English*, 348 So. 2d at 293.



"emergencies,"<sup>602</sup> implying that the likelihood of some injury must be real and immediate.

As with many of the other extraordinary writs, the Florida Supreme Court sometimes withholds formal issuance even when prohibition is granted.<sup>603</sup> This is a custom not uniformly followed in the cases, and is usually done as a matter of courtesy or when the Court is confident a respondent will adhere to the decision. Failure to withhold a writ in particular cases thus has no real significance, because the result is the same.

#### D. *Habeas Corpus*

The best known of the extraordinary writs is habeas corpus, whose name in Latin means "You should have the body."<sup>604</sup> The name arises from the fact that the writ always began with these words, which were directed to one who was detaining another person. The writ typically required the respondent to bring the body of the detained person into court so that the validity of the detention might be examined.<sup>605</sup> Habeas corpus thus arose as a writ of inquiry used to determine whether the detention is proper<sup>606</sup> or, put more accurately, whether the restraint on liberty is lawful.<sup>607</sup> Potentially, any deprivation of personal liberty can be tested by habeas corpus, and for that reason it is often called the Great Writ.<sup>608</sup>

The obvious relationship to the constitutional right of liberty<sup>609</sup> explains why habeas corpus is the only writ specifically guaranteed by the Florida Constitution's Declaration of Rights, which forbids suspension of habeas corpus except in cases of rebellion or invasion.<sup>610</sup> Habeas corpus is also the most frequently used and most generously available of the extraordinary writs. For that reason, the case law is exceedingly complex. Entire treatises have been written addressing the writ's many nuances. A

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602. *Id.* at 296.

603. *E.g.*, *Bloom*, 497 So. 2d at 3.

604. AMERICAN HERITAGE DICTIONARY 586 (2d ed. 1985).

605. There no longer is any absolute requirement that the detained person be brought to court, and this earlier practice rarely occurs in the Florida Supreme Court today.

606. *Allison v. Baker*, 11 So. 2d 578 (Fla. 1943).

607. *Sylvester v. Tindall*, 18 So. 2d 892 (Fla. 1944).

608. *See State ex rel. Deeb v. Fabisinski*, 152 So. 207 (Fla. 1933). In ancient times, the writ of habeas corpus was divided into many subcategories, most of which now are irrelevant or have been superseded by other devices such as the *capias* or bench warrant. *Id.*

609. FLA. CONST. art. I, § 9.

610. FLA. CONST. art. I, § 13. However, habeas corpus to some extent is regulated by statute. *See* FLA. STAT. §§ 79.01-79.12 (1991).

full discussion of habeas corpus thus is not possible within the limited space of this article.

The standard of reviewing habeas claims can also be complex. In very broad and general terms, the Court has said that habeas cannot be issued except where the petitioner shows reasonable grounds to believe that a present, actual, and involuntary restraint on liberty is being imposed without authority of law and that no other remedy exists. Habeas is improper if the restraint has ended,<sup>611</sup> if there is no actual restriction on liberty,<sup>612</sup> or if restrictions on liberty are mere future possibilities<sup>613</sup> or have not been coercively imposed.<sup>614</sup> Even limited restraints on liberty can be sufficiently coercive to justify habeas relief, including an unlawfully imposed parole.<sup>615</sup>

Habeas is also proper only if the restraint is without legal justification<sup>616</sup> and no other remedy exists to correct the problem.<sup>617</sup> It is often said that habeas cannot substitute for remedies available by appeal, by motion to dismiss, or by proper use of procedural devices that were available prior to the time the restraints on liberty were imposed.<sup>618</sup> Thus, strictly speaking, habeas would not be a proper remedy where counsel failed to make a timely motion that could have prevented the restraint on liberty, though the matter potentially might be reviewable as a claim for ineffective assistance of counsel.

Likewise, habeas is improper to the extent that the restraint on liberty itself is not the true issue. This often hinges on fine distinctions. For example, inmates alleging that "early release" credits were computed in an unconstitutional manner would not be entitled to habeas. In that instance, the real issue was not the self-evident restraint on liberty, but the improper performance of a ministerial act (computing "early release" credits) that may or may not reflect on the lawfulness of the detention; and habeas thus, was not the proper remedy.<sup>619</sup>

In sum, habeas is not a proper remedy if some unfulfilled condition precedent still must occur to render any further restraint on liberty unlawful

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611. *Rice v. Wainwright*, 154 So. 2d 693 (Fla. 1963).

612. *Sellers v. Bridges*, 15 So. 2d 293 (Fla. 1943).

613. *Thompson v. Wainwright*, 328 So. 2d 487 (Fla. 1st Dist. Ct. App. 1976).

614. *See Sullivan v. State*, 49 So. 2d 794 (Fla. 1951).

615. *Camley v. Cochran*, 123 So. 2d 249 (Fla. 1963), *rev'd on other grounds*, 369 U.S. 506 (1962).

616. *State ex rel. Davis v. Hardie*, 146 So. 97 (Fla. 1933).

617. *Brown v. Watson*, 156 So. 327 (Fla. 1934).

618. *Adams v. Culver*, 111 So. 2d 665 (Fla. 1959).

619. *Waldrup*, 562 So. 2d at 687.

even if the writ were issued. But habeas would be one possible remedy at a later date if “early release” credits were properly computed, the inmate clearly was entitled to release, and prison officials failed to honor the law. It is worth noting, however, that an allegedly invalid death penalty itself constitutes a restraint on liberty even where there is no question that the defendant will remain in prison even if the penalty is vacated.<sup>620</sup> But the habeas petitioner’s claim must genuinely be directed at the validity of the penalty itself, not at some other matter.<sup>621</sup>

There are three special aspects of habeas corpus that deserve a passing mention. The most common and obvious use of habeas corpus is by inmates who wish to challenge the lawfulness of their present imprisonment. Dozens of petitions to this effect come to the Florida Supreme Court every week.<sup>622</sup> However, habeas corpus is not strictly confined to a penal or even a criminal-law setting. “Civil detention” of a person can potentially be tested by the writ of habeas corpus, including matters beyond the obvious example of involuntary commitments for psychiatric treatment.<sup>623</sup> Even detention imposed on someone by a private individual potentially can be tested by habeas corpus. The most common use is where one parent alleges that the other parent has taken custody of a child wrongfully.<sup>624</sup>

The second point deserving mention is that the remedy available by habeas corpus has been supplemented and modified somewhat since the 1960s by innovations in the Florida Rules of Court. Some types of habeas claims by inmates now must be brought under Rule of Criminal Procedure 3.850<sup>625</sup> in the trial court where the matter in question originated. Rule

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620. Compare *Fitzpatrick v. Wainwright*, 490 So. 2d 938 (Fla. 1986) (death penalty vacated on habeas petition, and case remanded for new proceedings), with *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988) (death penalty ultimately reduced to life imprisonment for same defendant).

621. The court itself sometimes overlooks the fine distinctions that can be involved in determining whether a petition genuinely is challenging a restraint on liberty, not some other matter. See discussion of the case of Michael Durocher *infra* text accompanying notes 660-63.

622. These petitions often are in the form of handwritten notes that do not meet the court’s usual filing requirements. However, the court accepts all such “*pro se*” petitions if they fairly appear to be seeking some form of relief, sometimes even assigning volunteer counsel to assist in exceptional cases. The court has held that even informal communications can be sufficient to petition for habeas corpus. *Crane v. Hayes*, 253 So. 2d 435, 442 (Fla. 1971).

623. E.g., *In re Hansen*, 162 So. 715 (Fla. 1935).

624. E.g., *Crane v. Hayes*, 253 So. 2d 435 (Fla. 1971); *Porter v. Porter*, 53 So. 546 (Fla. 1910).

625. FLA. R. CRIM. P. 3.850.

3.850 was originally created by the Florida Supreme Court as an emergency means of dealing with the substantial turmoil created by the decision of the United States Supreme Court in *Gideon v. Wainwright*.<sup>626</sup> At the time, the Rule's immediate purpose was to prevent the Florida Supreme Court from being overwhelmed by habeas petitions prompted by *Gideon*'s holding that Florida had violated the rights of hundreds of indigent felony offenders convicted without benefit of counsel.<sup>627</sup>

Over the years, Rule 3.850 has retained its original purpose of creating a procedural "channel" through which a large class of "habeas" claims must flow. There is already a detailed body of case law interpreting the Rule, so bulky that an adequate outline cannot be given in an article of this size. However, the Court has not lost sight of Rule 3.850's origin as a refinement of habeas corpus.

In a 1988 case, for example, the Court described Rule 3.850 as "a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus," one that creates a fact-finding function in the trial courts and a uniform method of appellate review.<sup>628</sup> In 1992, the Court further suggested that Rule 3.850 must be construed in a manner consistent with the Florida Constitution's stricture that habeas corpus shall be "grantable of right, freely and without cost."<sup>629</sup>

These refinements to habeas corpus again show how even the extraordinary writs evolve over time. Obviously, further evolution will occur in years ahead as new problems arise that are unanticipated in the thousand years of Anglo-American precedent upon which Florida's legal system draws. Such changes are not necessarily bad, nor do they necessarily require amendment of the constitution. The upheaval caused by *Gideon*, for example, was met and overcome through the Court's rule-making powers, described more fully below.<sup>630</sup> The Court "channelized" habeas corpus into an orderly procedural process that not only was consistent with the constitution but helped ensure that fundamental rights would be honored without delay.

The final point to note is that the Florida Constitution does something very unusual with the habeas power it grants: The power is conferred upon

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626. 372 U.S. 335 (1962). The problems *Gideon* caused, as well as the Florida Supreme Court's response, are recounted in *Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963).

627. *Roy*, 151 So. 2d at 827.

628. *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988) (citing *State v. Wooden*, 246 So. 2d 755, 756 (Fla. 1971)).

629. *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992) (quoting FLA. CONST. art. I, § 13).

630. See discussion *infra* part VIII.C.

each justice of the Florida Supreme Court individually.<sup>631</sup> In other words, the constitution permits each justice to issue the writ as an individual without the necessity of obtaining assent from a majority of the Court. The justices' individual power of granting habeas corpus underscores that ready access to the writ was intended as part of the constitution's protection of liberty.

#### E. "All Writs"

The state constitution also grants the Florida Supreme Court authority to issue "all writs necessary to the complete exercise of its jurisdiction."<sup>632</sup> The operative constitutional language here has remained essentially unchanged for many decades now,<sup>633</sup> although the construction placed on that language has fluctuated almost erratically at times. As a result, the Court's "all writs" authority remains one of the most confusing and unsettled areas of jurisdiction, a problem worsened by the infrequency of all writs cases. The all writs clause cannot be understood apart from its history.

Prior to 1968, the cases dealing with the all writs clause plainly stood for two things. First, the all writs power could not be invoked unless a cause was already pending before the Court on some independent basis of jurisdiction. Second, the Court's authority in this regard could only be directed at purely ancillary matters. In sum, "all writs" meant ancillary writs in pending proceedings.<sup>634</sup>

Then, in the 1968 case of *Couse v. Canal Authority*,<sup>635</sup> the Court suddenly and dramatically overruled its earlier standard of review. "All writs" authority would now exist over any matter falling within the Court's "ultimate power of review" even if no case on the matter was pending in the Florida Supreme Court at the time. The 1968 Court, then *sua sponte*, amended the Rules of Appellate Procedure to set forth its new standard: All writs jurisdiction exists "only when it is made clearly to appear that the writ is in fact necessary in aid of an ultimate power of review."<sup>636</sup> In sum, the

631. FLA. CONST. art. V, § 3(b)(9).

632. FLA. CONST. art. V, § 3(b)(7). For a discussion of the history underlying this provision and the case law, see Robert T. Mann, *The Scope of the All Writs Power*, 10 FLA. ST. U. L. REV. 197 (1982).

633. Compare FLA. CONST. art. V, § 3(b)(7) with *Couse v. Canal Authority*, 209 So. 2d 865, 867 (Fla. 1968) (quoting FLA. CONST. of 1885, art. V (1957)).

634. E.g., *State ex rel. Watson v. Lee*, 8 So. 2d 19, 21 (Fla. 1942).

635. 209 So. 2d 865 (Fla. 1968).

636. *Couse*, 209 So. 2d at 867 (quoting FLA. R. APP. 4.5(g)(1) (as amended)). Apparently, the new standard merely expanded jurisdiction. The Court still continued to

standard of review was changed from “ancillary writs” to “aiding ultimate jurisdiction,” though it was not altogether clear in *Couse* what this change meant.

Two years later, the Court mentioned its all writs powers in a way that apparently expanded them even further. In a rancorous dispute between the Governor and the Legislature, the 1970 Court seemed to suggest that it was exercising some form of original all writs jurisdiction because the case “vitally affect[ed] the public interest of the State.”<sup>637</sup> However, the case is vague and actually may have involved the issuance of a writ of prohibition, with the Court imprecisely referring to “the all writ section” as the basis for jurisdiction,<sup>638</sup> a misreference that has also happened elsewhere.<sup>639</sup>

Later cases, unfortunately, have read this same vague language quite expansively. In 1974, the Court confronted a case involving the all writs authority of the district courts of appeal. While deciding the case, the Court detoured into dicta reiterating the 1968 standard of review and adding to it: The Florida Supreme Court’s original all writs jurisdiction now would extend to “certain cases [that] present extraordinary circumstances involving public interest where emergencies and seasonable consideration are involved that require expedition.”<sup>640</sup> It was unclear whether this dictum was a revision of the *Couse* standard or merely added an additional requirement that must be met before all writs jurisdiction could be invoked. If the former, “all writs” could have been converted into a form a “reach-down” jurisdiction by which any sufficiently important case could originate in the Florida Supreme Court, with all trial and appellate issues potentially being resolved in one sitting.

For the next two years, the Court made little effort to explain whether its all writs power would operate so sweepingly.<sup>641</sup> Then in 1976 another

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issue ancillary writs in pending proceedings under its all writs power. See *Booth v. Wainwright*, 300 So. 2d 257, 258 (Fla. 1974).

637. *State ex rel. Pettigrew v. Kirk*, 243 So. 2d 147, 149 (Fla. 1970).

638. See *id.* The headnote says that prohibition was issued, though the text of the opinion is vague on this point. *Id.*

639. *E.g.*, *City of Tallahassee v. Mann*, 411 So. 2d 162, 163 (Fla. 1981) (all writs clause cited as basis of jurisdiction in granting prohibition). The misreference also was tempted by another fact: Both prohibition and “all writs” are authorized by the same sentence in the constitution, though the two actually are distinct and subject to radically different standards of review. See FLA. CONST. art. V, § 3(b)(7).

640. *Monroe Educ. Ass’n v. Clerk, Dist. Ct. of Appeal*, 299 So. 2d 1, 3 (Fla. 1974).

641. *E.g.*, *McCain v. Select Committee on Impeachment*, 313 So. 2d 722, 722 (Fla. 1975). The *McCain* case involved an effort by a sitting justice of the Florida Supreme Court

dramatic reversal occurred: The Court suddenly reverted to its pre-1968 standard of review. No real reason for doing so was given,<sup>642</sup> and the Court did not mention or overrule the relevant cases it had issued since the late 1960s. Nor did the Court even note that the relevant Rule of Appellate Procedure still contained the language added *sua sponte* to enforce *Couse*.<sup>643</sup> The Court's decision was criticized as being "rightly decided but wrongly explained."<sup>644</sup>

The older ancillary writs standard does seem dated in light of modern procedural innovations. Common-law "ancillary writs" such as *audita querela* have vanished from the law, replaced by procedural rules no longer even identified by the somewhat quaint term "writ." In the Florida Supreme Court, modern-day descendents of the old ancillary writs are sometimes still seen, such as the writ of injunction and the related concept of a judicial "stay." However, the Court in recent years has never attempted to use the all writs clause as the basis of jurisdiction over such matters. Rather, the Court routinely finds some other basis of jurisdiction.<sup>645</sup> In this light, an ancillary writs standard risks converting "all writs" into something essentially meaningless, contrary to the settled rule that all constitutional language should be construed to have an effect if at all possible.<sup>646</sup>

Nevertheless, by the late 1970s, the Court seemed to be applying the restrictive ancillary writs standard, though it typically did so with a minimum of explanation.<sup>647</sup> Then, in 1982, everything changed again:

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to stop impeachment proceedings against him. When he sought relief under the all writs clause, the court rejected it on the grounds that it failed to set forth "a claim within the jurisdiction and responsibility of the court." *Id.* This statement, while vague, seemed much more limited than the sweeping statements the court had made only a year earlier in 1974.

642. The Court only cited one case that had nothing to do with the all-writs clause and a 1942 case that clearly had been overruled in 1968. *Shevin ex rel. State*, 333 So. 2d 9, 12 (Fla. 1976) (citing *Wilson v. Sandstrom*, 317 So. 2d 732 (Fla. 1975)); *State v. Lee*, 8 So. 2d 19 (Fla. 1942)).

643. FLA. R. APP. P. 4.5(g)(1). The Rule's language was even quoted two years later in an opinion apparently applying the pre-1968 standard of review. *Besoner v. Crawford*, 357 So. 2d 414, 415 (Fla. 1978).

644. Robert T. Mann, *The Scope of the All Writs Power*, 10 FLA. ST. U. L. REV. 197, 212 (1982).

645. *E.g.*, *Jones v. State*, 591 So. 2d 911, 912, 916 (Fla. 1991) (stay of pending execution based on Court's jurisdiction over judgments imposing sentence of death); *The Florida Bar v. Dobbs*, 508 So. 2d 326, 327 (Fla. 1987) (writ of injunction against unlicensed practice of law based on Court's jurisdiction to regulate practice of law).

646. *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13, 16 (Fla. 1974).

647. *Id.*; *St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1304-05 (Fla. 1980) (all writs clause cannot confer jurisdiction over district court PCA).

Another dispute between the Legislature and the Governor came to the Court that was hard to pigeonhole into any particular basis of jurisdiction. To hear the case, the Court abruptly returned to the less restrictive *Couse* standard it had adopted in 1968 and apparently abandoned in 1976. Once again, no effort was made to overrule or reconcile the inconsistent cases.<sup>648</sup>

Significantly, the 1982 Court made no mention of its earlier dicta suggesting that all-writs jurisdiction would exist if the issue was merely important enough. Rather, the Court applied the earlier "aiding ultimate jurisdiction" standard that had been developed in 1968 by *Couse*. The Court found that it had all-writs jurisdiction in this particular case because the Governor had taken actions that might restrict the Legislature's ability to reapportion the state's legislative and congressional districts. Florida's Constitution requires the Court to review all apportionment plans for constitutionality,<sup>649</sup> so the Governor's actions could have limited the Court's ultimate exercise of that jurisdiction.

Very little has happened in more recent years to illuminate the all writs power. In 1984, the Court cited the all writs clause as the basis for hearing a death-row inmate's request for a judicial order requiring a competency hearing, though no relief was granted.<sup>650</sup> Exercising jurisdiction in this manner was consistent with the "aiding ultimate jurisdiction" standard. The state constitution assigns the Florida Supreme Court exclusive and mandatory appellate jurisdiction over cases involving death sentences.<sup>651</sup> Thus, the Court has the ultimate jurisdiction to ensure that executions are conducted lawfully. The all writs clause could be invoked, in other words, to review any matter or to issue any order necessary to ensure the propriety of a death sentence. An example would be ordering a judicial determination of competency where there was a serious enough question.

Nevertheless, the only rule that can be distilled from this confusing body of law is that the "aiding ultimate jurisdiction" standard apparently prevails at the moment. Its true scope remains somewhat unclear, especially since the earlier dicta about "sufficiently important" cases has never actually been overruled.

The better view probably is that the Court rejected these dicta by ignoring them in its more recent opinions, or else regards them as an *additional* requirement above and beyond "aiding ultimate jurisdiction."

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648. *Florida Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982).

649. FLA. CONST. art. III, § 16(c).

650. *Alvord v. State*, 459 So. 2d 316, 317-18 (Fla. 1984).

651. FLA. CONST. art. V, § 3(b)(1).



There are sound reasons for this conclusion. A "sufficient importance" standard could convert "all writs" into a broad form of reach-down jurisdiction, even though the 1980 jurisdictional reformers considered and rejected much the same thing.<sup>652</sup> Moreover, sufficient importance is an inherently subjective concept that would be hard to define in practice.

The *Couse* standard is probably best seen as very limited and cases qualifying under it would be rare. The policy of "aiding ultimate jurisdiction" makes most sense when confined to a class of cases over which the Court normally would have some form of original or appellate jurisdiction, but where the full and complete exercise of that jurisdiction seems likely to be curtailed or defeated before the Court could otherwise hear the case. That would mean there are two elements: the existence of "ultimate jurisdiction" found in the text of the constitution, and some unusual and impending factor likely to limit or frustrate the complete exercise of that jurisdiction.<sup>653</sup> This is consistent with the constitution, which itself says that the purpose of "all writs" is to allow a "complete exercise" of jurisdiction.<sup>654</sup>

The "ultimate jurisdiction" requirement would also mean that properly written court opinions should identify at least two constitutional provisions establishing jurisdiction. One would be the provision creating the ultimate basis of jurisdiction, and the other would be the all writs clause. In other words, "all writs" as conceived in *Couse* has a "dual jurisdiction" requirement.<sup>655</sup>

The few cases already decided in this subcategory suggest another significant conclusion: The Court's all writs power is on its firmest footing in death cases, especially those involving pending executions,<sup>656</sup> and in pressing governmental crises.<sup>657</sup> In that vein, it is worth noting that the case *In re Order on Prosecution in Criminal Appeals*,<sup>658</sup> is probably best understood as an all writs case mistakenly assigned to the wrong category of jurisdiction. The case obviously involved a pressing governmental crisis,

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652. See *Jurisdiction supra* note 320, at 193-96.

653. Obviously, this could include such traditional ancillary concerns as issuance of a temporary injunction or the stay of lower court proceedings. See Mann, *supra* note 644 at 200-02.

654. FLA. CONST. art. V, § 3(b)(7).

655. *Accord Florida Senate*, 412 So. 2d at 361 (citing both all writs clause and ultimate basis of jurisdiction).

656. E.g., *Alvord*, 459 So. 2d at 316.

657. *Florida Senate*, 412 So. 2d at 360; *accord Mize v. County of Seminole*, 229 So. 2d 841 (Fla. 1969).

658. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130 (Fla. 1990).

as the Court expressly noted.<sup>659</sup> A strong argument existed there that the county governments affected by the district court's *sua sponte* order should have been joined as parties below under the rule of due process. Moreover, the Florida Supreme Court had "ultimate jurisdiction" over the kind of case involved,<sup>660</sup> and the district court's failure to join the counties threatened to deprive the Florida Supreme Court of the full exercise of its ultimate jurisdiction because of a technical lack of standing. This would justify "all writs" review under the *Couse* standard.

Another recent death case illustrates much the same situation. In 1993, death-row inmate Michael Durocher, the subject of an active death warrant, mailed a letter to the Florida Supreme Court seeking to dismiss his attorney and announcing that he would not oppose his own pending execution. His attorney, meanwhile, argued that Durocher was mentally incompetent and could not make an intelligent decision. The Court accepted the case and ordered the trial judge to hold a hearing to determine whether Durocher was making an intelligent waiver of his right to counsel.<sup>661</sup>

As a basis of jurisdiction, the Court cited only its habeas powers.<sup>662</sup> However, the Court elsewhere has noted that the writ of habeas corpus is inappropriate if the actual dispute is not the lawfulness of a restraint on liberty.<sup>663</sup> That certainly was the case with Durocher because the only issue was whether his attempt to dismiss counsel was effective. The restraint on liberty was not in question. On the whole, Durocher's case is probably best understood as an all writs case mistakenly assigned to the wrong category of jurisdiction. All writs authority clearly was appropriate because of the unusual facts and the Court's ultimate jurisdiction to ensure the lawfulness of state executions.<sup>664</sup>

A few other aspects of all writs jurisdiction deserve comment. As noted above, the Court occasionally has cited the all writs clause as a basis for jurisdiction over writs such as prohibition, which are actually authorized by separate clauses or provisions of the constitution.<sup>665</sup> This is a practice that promotes confusion and should be avoided. The Court's all writs

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659. *Id.* at 1131.

660. "Ultimate jurisdiction" potentially existed here on a number of bases, including the Florida Supreme Court authority to review cases affecting a class of state or constitutional officers, the basis actually cited for jurisdiction in the case. See FLA. CONST. art. V, § 3(b)(3).

661. *Durocher v. Singletary*, No. 81,986 (Fla. Aug. 12, 1993).

662. *Id.* at 1.

663. *Waldrup*, 562 So. 2d at 687.

664. *Accord Alvord*, 459 So. 2d at 317-18.

665. See *supra* notes 638, 639 and accompanying text.

authority now has evolved into a distinct concept, so it muddies the waters to use the phrase "all writs" as a generalized reference to any or all of the extraordinary writs. The 1970 case of *Pettigrew*<sup>666</sup> apparently made this mistake and was later cited as authority in a questionable effort to expand the all-writs power. The better practice is to confine all writs jurisdiction to those cases applying the *Couse* standard, at least to the extent this is possible.

In this vein, it should be noted that there is at least one extraordinary writ, *error coram nobis*, for which the Court has tended to cite the all writs clause as a basis for jurisdiction.<sup>667</sup> However, that is an unusual case and in any event, *error coram nobis* now has been rendered largely obsolete. Previously the writ of *error coram nobis*<sup>668</sup> was the method by which a prior conviction could be challenged on the basis of newly discovered evidence.<sup>669</sup> In 1989, the Florida Supreme Court essentially abolished the writ as it applies to persons still incarcerated. Challenges by such persons now must be presented to the trial court pursuant to Florida Rule of Criminal Procedure 3.850.<sup>670</sup>

*Error coram nobis* appears to remain available only for persons not presently in custody.<sup>671</sup> Even this limited remnant is hard to justify. The only evident reason for retaining it is that Rule 3.850 technically is available only to prisoners in custody.<sup>672</sup> Yet this fact alone hardly seems to justify retaining the far more restrictive *coram nobis* standard<sup>673</sup> only for persons already released from custody. The better practice would be to allow all persons the same remedy when newly discovered evidence is presented to challenge a prior conviction. This would require a change in the Rules of Criminal Procedure,<sup>674</sup> but one that would seem worthwhile and fairer.

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666. *Supra* note 637.

667. *E.g.*, *Richardson v. State*, 546 So. 2d 1037, 1037 (Fla. 1989). *Coram nobis* is not mentioned in the constitution's grant of jurisdiction. *See* FLA. CONST. art. V, § 3(b).

668. The name is a peculiar blending of English and Latin. "Coram nobis" means "before us." The writ exists to bring an error "before us" for review, i.e. before the court. BLACK'S LAW DICTIONARY 543 (6th ed. 1991).

669. *Richardson*, 546 So. 2d at 1037.

670. For a discussion of Rule 3.850, see *infra* note 674.

671. *Jones*, 591 So. 2d at 915.

672. FLA. R. CRIM. P. 3.850(a).

673. *See Jones*, 591 So. 2d at 915.

674. This could be done simply by stating that persons not in custody who are challenging a prior conviction based on newly discovered evidence may proceed under Rule 3.850 the same as a person in custody. There will be a need for some procedure of this type, because persons released from custody sometimes do find new evidence that could exonerate them and clear their records. It hardly seems fair to apply the liberalized Rule 3.850 remedy

Attempts have sometimes been made to use the all writs clause as a means of resurrecting a variety of writs that existed in earlier common law. An example is the common-law writ of certiorari. This is an extraordinary "writ of review" that should be distinguished from the separate "appellate certiorari" jurisdiction previously granted to the Court by provisions of the Florida Constitution deleted in 1980. Common-law certiorari exists to review and correct actions by a lower tribunal that violate the essential requirements of the law where no other adequate remedy exists.<sup>675</sup> However, it is now clear that the Florida Supreme Court cannot issue the writ. The Court's authority in this regard was abolished in the 1957 jurisdictional reforms that created the district courts of appeal<sup>676</sup> and was not revived by the 1980 reforms.<sup>677</sup>

English common law at one time had developed many other legal devices labeled "writs." In theory, any of these could be "revived" by interpreting the Florida Constitution's all writs clause as a generalized reference. In practice, however, such a thing is unlikely to be necessary or wise. Most of the common-law writs dealt with problems fully covered by a variety of modern legal practices and procedures, most of which are no longer even considered to be "writs."<sup>678</sup> On the whole, it appears likely that the Florida Constitution's reference to "all writs" should be understood as creating a single highly specialized writ available in the extraordinary circumstances contemplated by *Couse*, with the possible exception of the highly limited (and questionable) form of *error coram nobis* that seems to remain today.

## VIII. EXCLUSIVE JURISDICTION

The constitution assigns the Florida Supreme Court exclusive original jurisdiction in five categories, most of which deal with regulation of Florida's Bench and Bar. The only exception is in the case of legislative apportionment, which is a unique concern.<sup>679</sup> Jurisdiction is both exclu-

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to those in custody, while restricting all others to the hidebound and quirky standards that made *error coram nobis* virtually impossible to obtain. *See id.*

675. *E.g.*, Kilgore v. Bird, 6 So. 2d 541 (Fla. 1942).

676. Robinson v. State, 132 So. 2d 3, 5 (Fla. 1961).

677. Allen v. McClamma, 500 So. 2d 146, 147 (Fla. 1987).

678. For example, the writ of *audita querela* now has been supplanted by the motion for relief from judgment authorized in the Rules of Civil Procedure. BLACK'S LAW DICTIONARY 131 (6th ed. 1991).

679. *See* discussion *infra* part VIII.E.

sive and original because most of the topics embraced within this category involve the Court's administrative powers over the state's judiciary and lawyers. In the case of apportionment, jurisdiction is premised on the necessity of a final and swift legal determination that Florida's electoral districts are constitutionally valid each time they are altered.

#### A. *Regulation of The Florida Bar*

The state constitution assigns the Florida Supreme Court exclusive jurisdiction over the discipline of persons admitted to practice law.<sup>680</sup> As a result, attorneys are the only profession that cannot be regulated through agencies created by the Legislature. They fall within the exclusive purview of the Court. Moreover, on June 7, 1949, the Florida Supreme Court "integrated" The Florida Bar;<sup>681</sup> that is, it designated it as an arm of the Court for purposes of regulating the practice of law. The Bar maintains that function to this day.<sup>682</sup> Integration effectively means that no one can practice law in Florida without first becoming a member of The Florida Bar.

Regulation of attorneys operates on a number of levels. For one thing, the Court controls admissions to the Bar and promulgates rules that regulate the profession's governance and the procedures used in court.<sup>683</sup> The Court's most significant power is its ability to discipline lawyers for improprieties based on a detailed set of ethical rules governing attorney conduct,<sup>684</sup> with The Florida Bar serving as primary enforcer.

Allegations of unethical conduct are investigated and, if meritorious, may be reviewed by Bar counsel or Bar grievance committees. The matter then may be examined by the Board of Governors of The Florida Bar. Subject to the Board of Governor's control, Bar counsel then may file a complaint with the Florida Supreme Court, which initiates formal charges against the lawyer in question. At this point, the chief justice usually appoints a "referee" to resolve factual issues and make recommendations regarding discipline. Referees ordinarily are sitting county or circuit judges, however, retired judges also can be appointed.<sup>685</sup>

Procedures before the referee are highly regulated by court rules and are conducted as adversary proceedings, like a trial. After hearing the

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680. FLA. CONST. art. V, § 15.

681. *In re Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949).

682. FLA. R. REGULATING THE FLA. BAR 3-3.1.

683. See discussion *infra* part VIII.C.

684. See generally FLA. R. REGULATING THE FLA. BAR.

685. *Id.* 3-7.5.

evidence, the referee will issue a report setting down factual findings and recommended discipline, if any. The report is then forwarded to the Court. At this point, many attorneys decline to challenge the referee's findings and recommendations, which the Court then summarily affirms. If attorneys dispute the reports, their cases usually are accepted for review as a "no request" (without oral argument), although in rare cases oral argument is granted. The Bar also can challenge a referee's report.

Factual findings contained in the referee's report are presumptively correct and are accepted as true by the Court unless such findings lack support in the evidence,<sup>686</sup> or, stated another way, unless clearly erroneous.<sup>687</sup> Proceedings before the Florida Supreme Court are not trials *de novo* in which all matters might be revisited.<sup>688</sup> However, the referee's purely legal conclusions (including disciplinary recommendations) are subject to broader review,<sup>689</sup> though they come to the Court with a presumption of correctness.<sup>690</sup> In practice, the Court will depart from recommended discipline deemed too harsh or too lenient. However, the Court almost never exceeds the discipline actually requested by Bar counsel.

Discipline can range from a reprimand to disbarment. Nearly all forms of discipline result in a public record of the attorney's misconduct. Disbarred attorneys typically cannot be readmitted to practice law unless at least five years have passed and they prove they have been rehabilitated—a difficult thing to do in many cases.<sup>691</sup> Occasionally, the Court disbars without leave to reapply, in which case readmission is possible only by petitioning the Court for permission.<sup>692</sup>

## B. Admission to The Florida Bar

The constitution also grants the Florida Supreme Court exclusive jurisdiction over admitting persons to practice law.<sup>693</sup> To oversee Bar admissions, the Court has created the Florida Board of Bar Examiners. This agency reviews all applications for admission using detailed standards included in the Rules of Court.<sup>694</sup> Every Bar applicant must undergo a

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686. *The Florida Bar v. Bajoczky*, 558 So. 2d 1022 (Fla. 1990).

687. *The Florida Bar v. McKenzie*, 442 So. 2d 934 (Fla. 1983).

688. *The Florida Bar v. Hooper*, 507 So. 2d 1078 (Fla. 1987).

689. *The Florida Bar v. Langston*, 540 So. 2d 118 (Fla. 1989).

690. *The Florida Bar v. Poplack*, 599 So. 2d 116 (Fla. 1992).

691. *The Florida Bar re Lawrence H. Hipsh, Sr.*, 586 So. 2d 311 (Fla. 1991).

692. *Id.*

693. FLA. CONST. art. V, § 15.

694. *See* FLA. SUP. CT. BAR ADMISS. RULE.

rigorous background investigation conducted by the Bar Examiners, must successfully complete a two-day examination on legal knowledge, and must pass a separate examination on legal ethics.

If the background investigation reveals anything reflecting poorly on an applicant's character or fitness, the Bar Examiners are also authorized to conduct a series of hearings to resolve the matter. Any decision coming out of this process can be taken to the Court by petition for further review. The Court can then accept, reject, or modify the recommendations of the Bar Examiners. Bar admission cases are usually confidential, though a few are occasionally made public and published in *Southern Second*, often with the applicant identified only by initials.<sup>695</sup>

### C. Rules of Court

The development and issuance of all rules governing practice and procedure before Florida Courts lies within the exclusive jurisdiction of the Florida Supreme Court.<sup>696</sup> Development of rules has been delegated to various committees of The Florida Bar, except local rules, which are developed by the state's lower courts, reviewed by the Local Rules Committee, and submitted to the Florida Supreme Court for approval.

Every four years these committees submit proposals for revisions, which the Court then accepts, rejects, or modifies. This "quadrennial" revision process is often supplemented in off-years by special proposals by the committees, petitions for revisions filed by Bar members, and the much rarer *sua sponte* revisions issued by the Court to meet some special need. Though it seldom happens, court rules can be repealed by a two-thirds vote in each house of the Legislature.<sup>697</sup> The lower courts cannot ignore or amend controlling rules.<sup>698</sup>

The Court's rule-making authority extends only to procedural law, not substantive law. Though the boundary separating the two is not entirely precise, the Court has said that "procedural law" deals with the course, form, manner, means, method, mode, order, process, or steps by which substantive rights are enforced.<sup>699</sup> "Substantive law" creates, defines, and

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695. E.g., Florida Bd. of Bar Examiners, Re: S.M.D., 619 So. 2d 297 (Fla. 1993).

696. Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991).

697. FLA. CONST. art. V, § 2(a).

698. State v. McCall, 301 So. 2d 774 (Fla. 1974).

699. Haven Fed. Sav. & Loan Ass'n, 579 So. 2d at 732.

regulates rights. In other words, "procedure" is the machinery of the judicial process while "substance" is the product reached.<sup>700</sup>

These distinctions are important because they separate the rule-making authority of the Court from the lawmaking authority of the Legislature. Thus, it is possible for the Legislature to enact a "procedural" statute that can be superseded by court rule<sup>701</sup> just as it is possible for the Court to enact a rule so substantive in nature that it violates the Legislature's prerogative.<sup>702</sup> Tussles between the two branches of government have erupted in the past, most noticeably in the development of the Florida Evidence Code. On occasion, the Court has even called for a "cooperative" effort with the Legislature in eliminating problems between conflicting statutes and rules.<sup>703</sup> The Court has also announced that it will make every effort to harmonize rules with relevant statutes, on the theory that legislative enactments embody the popular will. However, the Court lacks any authority to issue rules governing administrative proceedings, which fall within the legislature's authority.<sup>704</sup>

It is worth noting that by promulgating a rule, the Court does not vouch for its constitutionality. A court rule could thus be challenged in a future proceeding on any valid constitutional ground. This is because rules are issued as an administrative function of the Court, not as an adjudicatory function. For much the same reason, the act of promulgating a rule does not foreclose challenges that it contains "substantive" aspects and to that extent is invalid. Questions such as these can only be decided when affected parties bring an actual controversy for resolution.

#### D. *Judicial Qualifications*

The next form of exclusive jurisdiction governs "judicial qualifications," which exists solely for the purpose of disciplining the state's judges and justices for improprieties. It is analogous to Bar discipline, though accomplished through a different administrative agency. Jurisdiction here rests on a constitutional provision that specifies in considerable detail how such cases are reviewed.<sup>705</sup> As noted earlier, cases of this type are commenced at the instance of the JQC, which is authorized to investigate

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700. *Id.*

701. *E.g., id.*

702. *E.g., State v. Furen*, 118 So. 2d 6 (Fla. 1960).

703. *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992).

704. *Gator Freightways, Inc. v. Mayo*, 328 So. 2d 444 (Fla. 1976); *Bluesten v. Florida Real Estate Comm'n*, 125 So. 2d 567 (Fla. 1960).

705. FLA. CONST. art. V, § 12.



alleged impropriety by any judge or justice.<sup>706</sup> Upon recommendation of two-thirds of the JQC's members, the Florida Supreme Court is then vested with jurisdiction to consider the case.

Jurisdiction here is exclusive, however, because the findings and proposals of the JQC are considered to be only recommendations.<sup>707</sup> The JQC operates as an "arm of the court" much in the nature of a fact-finding referee in a Bar discipline proceeding. The JQC's recommendations are persuasive but not conclusive,<sup>708</sup> and the Florida Supreme Court has sometimes departed from recommended discipline.<sup>709</sup> Moreover, the JQC does not constitute a "court" in itself and thus, is not subject to the writ of prohibition.<sup>710</sup> Discipline recommended by the JQC will be imposed only when supported by clear and convincing proof of the impropriety in question.<sup>711</sup>

The Court has held that judicial qualification proceedings are not in the nature of a criminal prosecution and thus are not subject to the constitutional restraints peculiar to criminal law.<sup>712</sup> The doctrines of *res judicata* and double jeopardy do not apply<sup>713</sup> and the JQC can, therefore, inquire into matters previously investigated in other contexts. As noted earlier, the constitution automatically disqualifies the sitting justices of the Florida Supreme Court to hear a proceeding brought against one of their own number. Instead, a panel of specially appointed "Associate Justices" will hear the case.<sup>714</sup>

### E. Review of Legislative Apportionment

In every year ending in the numeral "2," the Florida Legislature is required to reapportion the state's legislative and congressional districts to reflect the latest United States Census. Reapportionment must be finalized before the fall's elections that same year, which might not be possible if lawsuits on the question began in some lower court and wended through the appellate system. Accordingly, the state constitution has given the Florida

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706. See discussion *supra* part II.H.1.

707. *State ex rel. Turner v. Earle*, 295 So. 2d 609, 611 (Fla. 1974).

708. *Id.*

709. *In re Inquiry Concerning a Judge, William A. Norris, Jr.*, 581 So. 2d 578, 579-80 (Fla. 1991).

710. *State ex rel. Turner*, 295 So. 2d at 611.

711. *In re LaMotte*, 341 So. 2d 513, 516 (Fla. 1977).

712. *In re Kelly*, 238 So. 2d 565, 569-70 (Fla. 1970).

713. *Id.* at 570.

714. See *supra* text accompanying notes 137-38.

Supreme Court exclusive, original, and mandatory jurisdiction to review each decennial reapportionment plan approved by the Legislature.<sup>715</sup>

The Court's authority in this regard is extraordinary. All questions regarding validity of the reapportionment plan can be litigated to finality in a single forum, for both trial and appellate purposes. Moreover, if the Legislature is unable to reapportion within certain time constraints, the Court itself has authority to impose a reapportionment plan by order.<sup>716</sup> Judicial apportionment, for example, was necessary in 1992 with respect to some of the state's districts.<sup>717</sup> In that instance, the Court was swayed by arguments of the United States Justice Department regarding the federal Voting Rights Act.<sup>718</sup> Thus, federal issues are an important concern here. It should be noted, however, that the Florida Supreme Court's determination of validity does not necessarily bind the federal courts.

## IX. CONCLUSIONS

The Florida Supreme Court was created in 1845 and held its first sessions the following year. Since that time, a considerable body of custom and precedent has come into existence regarding the Court's operation and jurisdiction. This body is not widely known outside the Court, nor has there been much previous effort to compile information about routine operations in one more or less comprehensive collection. The present article is an effort to fill this gap, providing information to lawyers and laypersons about their state's highest court.

On the whole, the review of custom and precedent shows a Court that is operating smoothly and fairly efficiently following the jurisdictional reforms of 1980. There have been occasional cases that may be difficult to square with the Court's limited jurisdiction, but these have been rare and are largely confined to categories seldom entertained. The Court's docket is manageable, and the present staff structure enables the justices to fulfill their various duties efficiently, while also disposing of their case assignments. Today, the Florida Supreme Court is one of the success stories in the state's more recent efforts to modernize its constitution.

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715. FLA. CONST. art. III, § 16(c).

716. *Id.*

717. *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543 (Fla. 1992).

718. *Id.* at 546-47.

# Florida's Constitution: A View From the Middle

**Harry Lee Anstead\***

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### I. INTRODUCTION

What role does our state constitution play in appellate decision-making? Obviously, this topic is as open-ended as the words suggest. The most accurate answer to this question is the hackneyed and overused rejoinder "it all depends." However, the "what" upon which "it all depends" can be fleshed out a little further from one judge's viewpoint. What follows are largely the ruminations of this judge as he reflects on the ebb and flow with which state constitutional issues have been brought before him.

### II. HIERARCHY OF LAWS

To begin with, when a state appellate judge raises her right hand to take the oath of office, she promises faithfully to execute and enforce the Constitution and laws of the United States as well as the constitution and laws of her own state. The United States of America is a single sovereign nation with a particular structure of government. As the pledge of allegiance proclaims, we are, indeed, "one nation, under God." Part of our governmental structure is the geographic division of the nation into separate states in a system we refer to as a federal republic. The states are not

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\* Judge, Fourth District Court of Appeal.

separate sovereign entities, but are in fact component parts of a single nation.

Why this lesson in grade school civics? Just as we regard a constitution as the basic charter and foundation of a government and the society it serves, we must remember a state judge must be ever cognizant of the basic principle that the Constitution and laws of the United States are at the top of the hierarchy of laws that control and guide the judge's resolution of legal issues brought to the court. The oath of office is not only a symbolic reflection of this hierarchy, it is the solid rock of the judge's assumption of her responsibilities as a judge, and a visible sign to the public of the judge's special pledge of allegiance. This pledge must be ever present in a judge's consciousness (and conscience).<sup>1</sup>

### III. PRACTICAL IMPORTANCE OF STATE LAW

Just because the constitution and laws of the state occupy a space below the Federal Charter in this legal hierarchy, it does not mean that the state constitution does not play an important, if not the most important, role

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1. Many believe the activism of the Warren Court in enforcing the Federal Constitution on both substantive and procedural fronts was largely the result of the failure of state court judges to enforce the basic rights citizens enjoy under the Federal Constitution and, indeed, the failure to enforce many provisions of their own state constitutions. This lesson must not be forgotten.

Of course, many state courts did recognize the federal constitutional rights of their citizens. Consider, for instance, the Florida Supreme Court's 1907 reversal of a criminal conviction where the defendant challenged the racial composition of his jury:

We think it sufficiently appears from the language of the challenge that there were colored men in Duval county competent to serve on the said jury. The challenge alleges "that there are, and were at the time of executing said venire, in Duval county, many thousand colored men of African descent of approved integrity, fair character, and sound judgment and intelligence, and fully qualified for jury duty; and this fact was well known to the sheriff of our said county."

These allegations of the challenge being admitted to be true by the demurrer thereto, and the defendant requesting the court to allow him to introduce witnesses to prove the truth thereof, the necessary conclusion is, therefore, that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States. The court erred in sustaining the demurrer. The court ought to have overruled the demurrer, and to have permitted the state to take issue thereon. The issues so raised is [sic] to be tried by the court on the proofs offered by the parties.

Montgomery v. State, 42 So. 894, 897 (Fla. 1907).

in a person's life as that life is affected by the law. Consider for a moment that currently there are 750 state judges, compared to some 29 federal judges, dispensing civil and criminal justice in Florida. These numbers provide a flavor of the comparative practical impact of state law compared to federal law on the average person. From a practical standpoint, it is state law and the state constitution which primarily determine the type of society and quality of life that a person will have in his home state. After all, under our Federal Constitution we have largely left it up to the states to determine the criminal, civil and administrative law that governs our relationships and activities. Only when state law collides with some important value recognized in our Federal Charter, or by our national Legislature, does state law give way.

#### IV. HISTORY

Someone once said (Justice Holmes, I believe) that the law is experience. In other words, the law is what has actually happened. The way certain things came to be strongly affects the way things are. While our present system of federalism—the relationship between the states and the central government—is essentially uniform throughout the country, it is worth noting at least one distinction among many in the origins of the state constitutions.

Many state constitutions were enacted and in place before the present Federal Constitution was drafted and adopted. Those states that declared their independence from England became small sovereign nations with their separate basic charters of government. The constitutions enacted by those states were, first and foremost, constitutions for separate nations. For example, they contained extensive protections for the personal rights of their citizens. Indeed, these constitutions and their provisions served as models and examples for the drafters of the Constitution of the United States.

Again, in taking the liberty to generalize, the origins and purpose of the constitutions of the original thirteen colonies (and some other states) should be distinguished from the constitutions of those states which came into the union much later, after the nature of the country as a single federal union had been well established in both its identity and authority. These later constitutions, though similar in content to their older siblings, were drafted and adopted in a context that somewhat anticipated their role as charters for states becoming a geographical and administrative part of an established sovereign nation. At the same time, however, the basic provisions of the constitutions of the earlier states were usually incorporated in these

constitutions.

While this particular difference in the origins of the various state constitutions may have little practical significance in a present day analysis of constitutional law, it is an important "experience" factor that should be in our consciousness when we discuss "states' rights" or debate other issues concerning the authority and role of the states in the federal union.

The substantial role of state government in our lives is a product of our unique history in becoming a nation. In other countries, administrative divisions of the central government based on geographical lines are just that: Administrative divisions typically utilized to more efficiently carry out government functions. At the risk of oversimplification, I cite the small nation of Ireland as an example. There the country government, while based on historic geographic lines, is more or less simply a subdivision of the national government. There is no constitution for County Court.

Florida was a federally owned territory before becoming a state in the federal union. Its first constitution was drafted by a group of settlers in 1838 at St. Joseph, Florida, some eight years before Florida was admitted as a state. The Federal Constitution and many state constitutions were then in existence, and these likely served as models and examples for the drafters of Florida's charter, including the provisions protecting the personal rights of its citizens.<sup>2</sup> The modern version of our constitution was adopted in 1968 after substantial redrafting was done by a statewide commission.

## V. DIVISION OF FUNCTIONS

A constitution performs many functions. It serves as a basic blueprint for people who live in a particular geographic area to come together, assess their values (especially in relation to how they will live together) and give expression to those important values in an agreement controlling their relationships. Many times the details are left to be worked out by the Legislature, the courts or the Executive Branch. However, the idea is to set aside certain fundamental and important values and give expression to them in a charter that will be enduring. While there is a means of amending this basic charter, the idea is not to rely on amendment as values may change (although that is certainly done), but rather to work hard to correctly identify fundamental values, articulate them in a written document, and

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2. For an extremely valuable insight into the origins and purposes of the provisions of Florida's Declaration of Rights, see Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549 (1993).

stand by them. The values articulated in a constitution often identify those things that set apart one society or group of people from another. Similarly, the willingness to stand by these values, once properly identified, is one measure of the maturity and success of such a society.

The 1968 revision of the Florida Constitution represented a unique opportunity for citizens of both "old" and "new" Florida to discover or rediscover these important values and affirm them in their basic charter.<sup>3</sup> For that reason alone, the 1968 action must be counted as a tremendous success.

## VI. FLORIDA'S COURTS

There are four levels of courts in Florida: county courts, with limited civil and criminal jurisdiction; circuit courts, with general civil and criminal jurisdiction; district courts of appeal, with general appellate jurisdiction; and the supreme court, with broad, but well-defined, appellate and supervisory jurisdiction over the state court system.<sup>4</sup> Issues involving the state constitution may be raised in any of these courts. Review by the district courts, although somewhat technically broader, usually involves review of the circuit courts' decisions. This review is set out in the constitution and in the rules of appellate procedure.<sup>5</sup>

Under our adversarial system of justice, which relies heavily on procedural fairness to accomplish its goal of a just result, an enormous amount of control is placed in the hands of the litigants, and, in turn, in the hands of the lawyers representing them. By and large, this means that only issues raised by the parties are addressed by the courts.

At the appellate level, this ordinarily means that issues involving the state constitution will not be treated unless they were raised and considered in the trial court. Of course, there are exceptions involving fundamental error or the patent unconstitutionality of a statute or action that may cause an appellate court to act even though the issue was not raised in the trial court.<sup>6</sup> This is a very narrow exception, however, and appellate judges are

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3. Such activity has continued. In 1980, a unique "right of privacy" for Florida residents was added to the constitution. See FLA. CONST. art. I, § 23. Two years later, in a move in the "other direction," an amendment was added to limit the scope of Florida's version of the Federal Fourth Amendment to United States Supreme Court decisions construing the Fourth Amendment. See *infra* note 10.

4. See FLA. CONST. art. V, §§ 1, 3-6.

5. See *id.* § 4; FLA. R. APP. P. 9.030.

6. PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE §§ 5.7-5.8 (1988).

extremely reluctant to consider issues that a trial court has not had an opportunity to deal with, especially since a trial court is a more appropriate forum to develop the facts that must be established to determine the constitutional issue.

Appellate courts basically exist to review decisions made by the trial courts. When there is no "decision" on an issue, there is nothing to "review" in the ordinary sense. There is a wide disparity, usually depending on the nature of the constitutional provision involved, in the practice of the parties and their lawyers in the utilization of the state constitution to support their legal positions.

## VII. MEAT AND POTATOES

This disparity can be illustrated by comparing the routine use of state constitutional provisions concerning homestead, a subject untreated by the Federal Constitution, to the utilization of the provisions of the Declaration of Rights section of the Florida Constitution.<sup>7</sup> In many instances, these later provisions mirror the protection of rights afforded by the Federal Constitution. The "meat and potatoes" of the state constitution are those provisions meant to give structure to state government and control to the ordinary social, economic, and political intercourse between us. Because there are no duplicate or parallel provisions in the Federal Constitution, these provisions have always been relied upon in state courts as primary authority.

This is so simply as a matter of definition. Where the state constitution deals with issues of state concern, such as the structure of state government and the court system or the provisions concerning homestead, those provisions, just like the statutes enacted by the state legislature, will provide the ordinary grist for the state courts' mills. Not much has changed on that front. The "meat and potatoes" of the Florida Constitution has always been, and will for the foreseeable future be, a constant subject for Florida's appellate courts.

## VIII. DECLARATION OF RIGHTS

Until recently, however, in this judge's tenure,<sup>8</sup> it was rare that a

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7. Article I of the Florida Constitution is entitled "Declaration of Rights." FLA. CONST. art. I.

8. Judge Anstead has been an appellate judge since 1977.



personal right would be asserted on the basis of a provision in the Florida Constitution. Even today, the Declaration of Rights is seldom cited in appellate briefs. Perhaps this is due to the lack of education or emphasis on our state constitution in the state law schools, and in the various means of continuing legal education.

Another reason may be the visual prominence of the cases decided, especially by the United States Supreme Court, involving the protections afforded by the Federal Constitution. This is especially true concerning the Bill of Rights and other amendments to that document. In recent history, the national debate over the decisions of the *Warren* Court, and later the *Burger* and *Rhenquist* Courts, on issues of federal constitutional rights, has occupied center stage in the national and local media.<sup>9</sup> Yes, lawyers and their clients watch television and read newspapers, too. In contrast, state court decisions based upon the Declaration of Rights have, until recently, been not only rare, but even more rarely publicized.

## IX. TRENDS

Undoubtedly, personal rights are usually asserted by persons, and those persons are ordinarily under criminal prosecution by the government. Government agents are usually alleged to have violated the defendant's rights while investigating him for criminal conduct. The government has no personal rights to be asserted. As a matter of fact, the *Warren* Court was perceived to have been more apt to recognize and enforce a personal right under the Federal Constitution than the succeeding *Burger* and *Rhenquist* Courts. As a trend has developed in United States Supreme Court decisions favoring the government and limiting personal rights under the Federal Constitution, parties, their lawyers, and judges have "suddenly" discovered the Florida Constitution has a Declaration of Rights.

Of course, under the federal constitutional scheme and especially the Fourteenth Amendment, states are only prohibited from denying those protections afforded by the Federal Constitution. States are not prohibited from affording *greater* rights and protections to their citizens than the constitutional minimum afforded by the Federal Charter.<sup>10</sup> Recently, there

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9. The Warren Court refers to Chief Justice Earl Warren's tenure; the Burger Court refers to Chief Justice Warren E. Burger's tenure; and the Rhenquist Court refers to Chief Justice William H. Rhenquist's tenure.

10. Significantly though, in 1981, article I, section 12 of the Florida Constitution was amended to mandate that Florida courts construe its provisions in accord with United States

has been a sharp increase around the nation in state court decisions predicated upon state constitutions; a trend that has been true in Florida as well. In fact, Florida has become something of a national trend-setter on this subject.

But, to get back to basics, we must remember it is the parties and their lawyers who raise the issues. With respect to personal rights, it has been the parties and their lawyers who, finding themselves being turned away by the federal courts, have started raising issues predicated upon rights protected by their state constitutions. These litigants, who have increased in numbers, have brought about the court opinions expounding upon those state constitutional rights, and in many instances, have found those rights to be more expansive than many federal opinions have found in similar provisions in the Federal Charter. The interesting development in state constitutional law, still emerging and forming, involves cases where both the federal and state constitutions are implicated, usually with the assertion and protection of personal rights. As noted, Florida is free to extend greater personal rights to its residents than are provided in the Federal Charter.

#### X. FLORIDA'S DECLARATION OF INDEPENDENCE

Among others, retired Justice William Brennan of the United States Supreme Court, noting the trend of the *Rehnquist* Court, has been active in calling upon lawyers and state court judges to utilize their state constitutions to protect the rights of their citizens. There have been many articles written on the issue, as well as state court decisions around the country, proclaiming the independence of the state courts to invoke their own constitutions to protect individual rights.<sup>11</sup>

Perhaps the most significant and comprehensive opinion of the Florida Supreme Court on the independent force of our state constitution was

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Supreme Court's decisions construing the Fourth Amendment. FLA. CONST. art. I, § 12. The effect of this amendment has been a topic of sharp debate on the Florida Supreme Court, where a tenuous 4-3 majority has ruled that Florida courts are bound by future decisions of the United States Supreme Court. *See Perez v. State*, 620 So. 2d 1256 (Fla. 1993). I characterize the majority as "tenuous" because one of its members has declared that he believes this ruling is wrong, but that he is bound to follow it by stare decisis. *Id.* at 1258-61 (Overton, J., concurring).

11. *See* PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM: REPORT OF THE 1992 FORUM FOR STATE COURT JUDGES (Barbara Wolfson ed. 1993) (co-sponsored by The Roscoe Pound Foundation and Yale Law School).

handed down recently in *Traylor v. State*,<sup>12</sup> where the court declared:

Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits. Federalist principles recognize that although some government intrusion into the life of the individual is inevitable, such intrusion is to be minimized. Government encroachment is thus restricted by both the federal and state constitution.

....

Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. We are similarly bound under our Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy.<sup>13</sup>

No Justice in *Traylor* took issue with these statements.

The "primacy principle" announced in *Traylor* is now routinely applied by the Florida Supreme Court. For example, in *Allred v. State*,<sup>14</sup> the court took a case that had largely been decided on federal constitutional grounds in the trial and appellate courts, and boldly declared at the outset: "We begin our analysis with the Florida Constitution's Declaration of Rights,

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12. 596 So. 2d 957 (Fla. 1992).

13. *Id.* at 961-63 (citations omitted) (footnotes omitted).

14. 622 So. 2d 984 (Fla. 1993).

consonant with the primacy principle explained in *Traylor v. State*. Only if allegedly self-incriminating statements pass muster under our state constitution need we examine them under federal law.”<sup>15</sup> This is a clear charge to the legal community and to all levels of Florida courts to pay more attention to our state constitution.<sup>16</sup>

## XI. CONCLUSION

Because of the broad function served by the Florida Constitution in many areas of the law, it has long occupied a central role as the primary authority in the resolution of legal disputes in Florida courts. Furthermore, since the Florida Constitution remains the primary authority in those areas, that active role will continue.

A major change in the use of the constitution has occurred recently. This change involves the rights set out in the Declaration of Rights that somewhat parallel the guarantee of personal rights set out in the United States Constitution. While these state constitutional rights have been in place for some time, their invocation has been limited for a variety of reasons. Since personal rights must be invoked by persons, they may have been used infrequently by persons who perceived that state courts would construe such rights in a narrow fashion. When the federal courts began to strongly enforce similar provisions in the Federal Constitution, it made more sense to invoke those provisions. As the trend changed in the federal courts to one favoring the government, litigants have again turned to state constitutions and the state courts.

In Florida, the state’s high court has responded with a firm signal that the Florida Constitution is a resource available to Florida residents to protect their personal rights. As the word gets out, we can expect litigants, lawyers, and judges, to increasingly rely on the Declaration of Rights in the Florida Constitution as the primary protection for personal rights in Florida. Now that the trend has started, it is doubtful that it will be easily stopped or stalled, even if the trend in the United States Supreme Court should change. This move presents an immediate challenge to Florida’s law schools and continuing legal education programs to do a better job of emphasizing the

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15. *Id.* at 986.

16. Ironically though, this bold call to arms may at times amount to nothing more than a paper tiger. For instance, as discussed in note 10, Florida courts are bound to interpret article 1, section 12 of the Florida Constitution (our version of the Fourth Amendment) consistent with the United States Supreme Court’s interpretation of the Fourth Amendment.

importance of the Florida Constitution in our lives.

As a state court judge, I view this trend favorably because I see it as simply part of an overall scheme of government that was intended to operate this way all along. Under our federal system, the states must tip their caps and acknowledge that the central government is supreme, but the states have been left to run the show. Let's do it right, whether we are on the bottom or the top, or indeed, in the middle.

# ELM Street Revisited: The Florida Supreme Court's Rulemaking Authority and the Circuit Court's Subject Matter Jurisdiction Under the Local Government Comprehensive Planning Act—Real or Imagined?

John E. Fennelly\*

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\* Circuit Court Judge for the Nineteenth Circuit; Masters in Arts and Judicial Studies, University of Nevada, 1991; J.D. with honors, Chicago-Kent College of Law, 1975; A.B., cum laude, Loyola University of Chicago, 1970. Judge Fennelly would like to thank Deborah A. Sawyer, University of Florida, J.D. 1985, Law Clerk for the Nineteenth Circuit.

## I. INTRODUCTION

*Leon County v. Parker*<sup>1</sup> (“*Emerald Acres I*”) and *Emerald Acres Investments, Inc. v. Board of County Commissioners of Leon County*<sup>2</sup> (“*Emerald Acres II*”) are the stories of two parties’ unsuccessful attempts to obtain meaningful judicial review of adverse administrative actions by the Leon County government. They are not, to say the least, pretty stories. Neither are they, in the author’s view, the finest hours of Florida’s intermediate appellate courts. The First District Court of Appeal and Leon County effectively denied both parties access to meaningful judicial review of adverse administrative action. Although still pending, these rulings affected both parties’ rights to use property.<sup>3</sup> On the merits, the circuit court found this action to be a departure from the essential requirements of law and in violation of Leon County’s own ordinances.<sup>4</sup> In a remarkable display of legal legerdemain, the First District transformed the broad access and remedy provisions of the Local Government Comprehensive Planning Act<sup>5</sup> (“LGCPA”) into a legal spring gun that blew the unsuspecting parties into a legal “twilight zone.” These decisions, aside from due process considerations, raise serious constitutional issues and create further confusion in the post comprehensive plan legal environment.<sup>6</sup>

The constitutional issues involve both the appellate rulemaking authority of the Florida Supreme Court and the constitutional certiorari jurisdiction of the circuit courts. This paper will initially demonstrate that the First District was incorrect, and that the remedy provisions are simply cumulative to common law certiorari review. This argument allows harmonization of the act’s remedy provisions with existing precedent and avoids the constitutional issues raised by the decisions. The second part of

1. 566 So. 2d 1315 (Fla. 1st Dist. Ct. App. 1990).

2. 601 So. 2d 577 (Fla. 1st Dist. Ct. App. 1992).

3. The First District in *Emerald Acres II* denied rehearing, but certified the following question to the Florida Supreme Court: “Whether the right to petition for common law certiorari in the circuit courts of the state is still available to a landowner/petitioner who seeks appellate review of a local government development order finding comprehensive plan inconsistency, notwithstanding section 163.3215, Florida Statutes (1989)?.” *Id.* at 584.

4. Thus, the circuit court arguably found Leon County’s action to be arbitrary and capricious. *See id.* One commentator describes this highly deferential standard of review as a kind of judicially imposed lunacy test! MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 56 (1988).

5. FLA. STAT. §§ 163.3213, 163.3215 (1991).

6. *See* John E. Fennelly, *Just to Cage the Tiger: Proposed Judicial Resolutions to Consistency Challenges Under the Local Government Comprehensive Planning and Land Development Act*, 22 STETSON L. REV. 435 (1993).

the discussion will be directed to the constitutional implications of the decisions. The initial, or statutory construction, discussion will also require a detour into the administrative law of access as contrasted with the traditional notions of standing. In addition, it will be necessary to review the supreme court's previous treatment of common law certiorari. With the foregoing framework in mind, *Emerald Acres I* and *II* await.

## II. THE OPENING STAGE

### A. Round One: *Administrative Shell Games*

Emerald Acres and Parker submitted subdivision applications in accordance with Leon County's Comprehensive Plan. The County's Planning Commission, after review, denied the applications. The Commission's stated basis for denial was that the proposed subdivisions were "too dense when compared with other subdivisions in the area, thus violating" the comprehensive plan.<sup>7</sup> The petitioners then sought review of this decision by the County Commission. The Commission, while upholding the initial decision, remanded the applications to the Planning Commission. The stated purpose of the remand was "to advise the respondents as to how the plats could be corrected to make the proposed subdivisions consistent with the county's comprehensive plan."<sup>8</sup> After unsuccessful negotiations, Emerald Acres sought common law certiorari review in the circuit court. Leon County, at the outset, moved to dismiss the petition on the basis that Emerald Acres and Parker had not complied with the notice provisions of the LGCPA.<sup>9</sup> The circuit court denied the County's motion and proceeded to a hearing on the merits. The circuit court determined that the County's denial of the application "was a departure from the essential requirements of law."<sup>10</sup> The court based this determination on relevant portions of the County's own comprehensive plan. The circuit court found "the fact that sections 17.1-25(b) and (d) of the ordinance adopting the county's comprehensive plan provided that zoning classifications existing on the date of plan adoption would continue to determine allowable land uses until the zoning was changed."<sup>11</sup>

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7. *Emerald Acres I*, 566 So. 2d at 1316.

8. *Id.*

9. *See id.*

10. *Id.*

11. *Id.*



Based on the foregoing plan provisions, the court determined that “[i]nasmuch as the A-2 zoning classification for the subject properties had never been changed, and since the proposed subdivision plats were consistent with such zoning classification[s], . . . the subdivisions were consistent with the comprehensive plan. . . . [T]herefore, . . . the denials of the proposed plats, based upon inconsistency with the comprehensive plan, were erroneous.”<sup>12</sup>

The circuit court, therefore, granted the requested relief. Leon County appealed, using what would prove to be the spring gun in the LGCPA. Ironically, the circuit court’s factual determination that the County arbitrarily violated its own plan, has never been challenged or overturned.

### B. *Round Two: The Spring Gun is Loaded*

As indicated, Leon County argued on appeal that the trial court’s denial of its motion to dismiss was error. The County, based on its reading of the LGCPA remedy provisions, argued that the failure to comply with the time provisions of the remedy provisions was a complete defense to any judicial review. The First District agreed with the County’s position and reversed. The First District, in fact, found it unnecessary to “reach the merits of this determination [comprehensive plan compliance and arbitrary refusal by Leon County] because we find that the trial court should have granted the petitioner’s [Leon County] motion to dismiss filed in each case for failure of the respondents [Parker and Emerald Acres] to comply with Section 163.3125. . . .”<sup>13</sup> The First District, in reaching this conclusion, rejected the trial court’s conclusion that the statutory remedy provisions of the LGCPA applied only when local government approved an application and someone other than the applicant sought to challenge that decision.<sup>14</sup>

The mandatory construction of the time provisions, the First District argued, were both “reasonable and logical.”<sup>15</sup> The court reasoned “[a] local government, such as a county commission, often proceeds in an informal, free-form manner.”<sup>16</sup> Leon County, the court observed, “[r]ather than simply deny[ing] the respondent’s requests in the cases below . . . suggested that the respondents meet further with the Planning Commission

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12. *Emerald Acres I*, 566 So. 2d at 1316.

13. *Id.*

14. *Id.* at 1317.

15. *Id.*

16. *Id.*

in an effort to work out the differences.”<sup>17</sup> Mandatory reading of the notice provisions would, therefore, have “the salutary effect of putting such government body on notice that it should be prepared to defend its action and will need to create a record to support that action.”<sup>18</sup> Judge Nimmons, in dissent, approved the court’s interpretation of the statute’s remedy provisions. He would have found the notice provisions applicable only when “an aggrieved or adversely affected party” institutes an action “where the local governmental agency has *granted* the applicant’s proposal.”<sup>19</sup>

Emerald Acres and Parker moved for a rehearing, alleging that they had complied with the notice provisions, but had inadvertently omitted that fact in their certiorari petition.<sup>20</sup> The First District, in response, denied rehearing, but indicated that “on remand, the trial court may dismiss the complaints with leave to amend. If the trial court does grant leave to amend, Emerald Acres Inc., may . . . have that issue properly before the trial court for resolution.”<sup>21</sup> This set the stage for a judicial coup de grace to Emerald Acres attempt to obtain meaningful judicial review of Leon County’s denial of their application.

### C. Round Three: The Spring Gun is Fired

Emerald Acres dutifully returned to the trial court and filed an amended petition for certiorari and mandamus. The trial court this time around dismissed the complaint, finding “that the verified complaint was filed 58 days after the decision of the board, in violation of section 163.3215.”<sup>22</sup> The First District affirmed, and rejected Emerald Acres argument that the statutory notice period did not begin to run until the County’s action was

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17. *Emerald Acres I*, 566 So. 2d at 1317. It is difficult to follow the logic of the First District on this issue. If the parties were still trying to resolve the issues, then how could the ambivalent denial constitute final agency action and trigger the Act’s time clock?

18. *Id.*

19. *Id.* at 1318 (Nimmons, J., dissenting). Judge Nimmons, in essence, adopted the board access to non-applicants reading of the LGCPA remedy provisions. This concept will be the subject of extended discussion. See *infra* part II.

20. *Id.*

21. *Id.*

22. *Emerald Acres II*, 601 So. 2d at 579. As indicated in note 17, and its accompanying text, the Commission did not simply *deny* the application, but suggested further meetings between planners and the applicants. It is difficult to fathom how either applicant could have a clue that the clock was running. As noted, if the decision was final, what exactly remained to be worked out? Thus, Leon County’s invitation could be viewed fairly as administrative sandbagging. This makes the result reached by the First District a kind of judicial sanction for administrative cheap shots.

reduced to writing and sent to the applicant. "Section 163.3215," the court noted, "contains no requirement that the 'alleged inconsistent action' be reduced to writing."<sup>23</sup> The court then characterized the statutory notice provisions as a substantive "condition precedent to instituting a judicial action . . . ."<sup>24</sup> This characterization of the notice provisions enabled the court to also reject Emerald Acres' contention that those provisions were an unconstitutional infringement of the Florida Supreme Court's appellate rulemaking authority. This last conclusion was an *a priori* result reached without discussion or analysis that proved the truth of the old philosophy adage that when you define the terms, you have already won the argument.<sup>25</sup>

Judge Kahn, who reluctantly concurred on stare decisis principles, was plainly uncomfortable with the result.<sup>26</sup> In Judge Kahn's opinion, "sufficient cause exists to question the propriety of applying the statute to bar the present action."<sup>27</sup> The remedy provisions, in his view, should be read expansively so that "the new statutory remedy may well be seen as cumulative to common law certiorari . . . ."<sup>28</sup> Judge Kahn reached this conclusion because common law certiorari was essentially an appellate remedy in the circuit court, and "it does not follow that the availability of a more expansive remedy under the statute necessarily abrogates any right to certiorari review of the local government action."<sup>29</sup> Judge Kahn, in contrast to the majority, viewed the LGCPA remedy provisions as "legislatively establishing the means by which an interested person, *not a party to the proceedings before the local government body*, may seek to vindicate rights that are arguably protected under a previously adopted comprehensive

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23. *Id.* at 580.

24. *Id.*

25. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS*, 42 (1960). "[C]ourts do not yet regularly and as of course face up to their job of integrating the particular statute into the doctrinal whole;" and thus not "implementing the clear purposes of a statute with the full resources of a court or the matter of recognizing a clear and broad statutory policy in an apt area even though that area is not embraced by the literal language." *Id.* As will be discussed in part IV.B., the First District Court's conclusion on the appellate rulemaking issue is in direct contradiction to supreme court precedent and fails to integrate the Act's remedy provisions into the doctrinal whole of judicial review of administrative action.

26. *Emerald Acres II*, 601 So. 2d at 581 (Kahn, J., concurring).

27. *Id.*

28. *Id.* at 583.

29. *Id.*

plan.”<sup>30</sup>

Judge Kahn also expressed concern that the majority’s treatment of the remedy provisions of the LGCPA raised serious constitutional questions concerning the legislature’s power to limit circuit court common law certiorari jurisdiction and the supreme court’s exclusive appellate rule-making authority.<sup>31</sup> Judge Kahn, to avoid these separation of powers issues, expressed a preference for the approach used by the Fifth District Court of Appeal<sup>32</sup> in a similar case, *Splash & Ski, Inc. v. Orange County*.<sup>33</sup>

The Fifth District, as will be demonstrated, employed an approach that avoided constitutional problems and afforded the aggrieved parties relief against another legislatively created spring gun.

#### D. *Splash & Ski: The Spring Gun is Unloaded and Cased*

Splash & Ski, Inc., sought a special exception from Orange County to operate watercraft at “Shooters Waterfront Cafe.”<sup>34</sup> The application was denied, and Splash & Ski petitioned for common law certiorari in accordance with Florida Rule of Appellate Procedure 9.030(c)(3). Splash & Ski did not, however, comply with the notice provision of the special statute that permitted certiorari review of County Commission zoning decisions.<sup>35</sup> Although the record is not clear, the circuit court viewed the statutory remedy as exclusive and dismissed the petition. The circuit court’s view is similar to that of the First District in *Emerald Acres I* and *II*.<sup>36</sup>

On appeal, Splash & Ski argued that Orange County’s notice provisions violated article V, sections 2(a) and 5(b) of the Florida Constitution.<sup>37</sup> Splash & Ski also argued that, even if the provisions were constitutional, the remedy provided was cumulative to common law certiorari.<sup>38</sup>

30. *Id.* at 582. Thus, Judge Kahn embraced Judge Nimmons’ and the circuit court’s view of the intent of the access provisions in the Act enunciated in *Emerald Acres I*.

31. *Emerald Acres II*, 601 So. 2d at 582; see also *supra* note 3.

32. *Id.* at 583.

33. 596 So. 2d 491 (Fla. 5th Dist. Ct. App. 1992).

34. *Id.* at 493.

35. *Id.* An early law review article characterized Florida appellate law on certiorari as “confusing” and that major portions of opinions consist of misleading dicta that “mislead the Bar and afford the bench ‘authority’ for later decisions of questionable soundness.” William H. Rogers & Lewis Rhea Baxter, *Certiorari in Florida*, 4 U. FLA. L. REV. 477, 477 (1951) (containing an excellent discussion of common law and statutory certiorari).

36. *Splash & Ski*, 596 So. 2d at 495.

37. *Id.* at 493.

38. *Id.*

Judge Griffin, writing for the court, deftly avoided the constitutional issues raised by the appeal. She did, however, express serious reservations concerning the validity of the statutory provision if read so as to eliminate common law certiorari. Judge Griffin noted pointedly: "If the existence of Orange County's statutory certiorari procedure were to preclude review by common law certiorari, the petitioner's argument that the unique requirements of Orange County's special act violate the Florida Constitution would have to be seriously considered."<sup>39</sup>

Judge Griffin also took pains to note that, "[w]e are unaware whether any other county presently has a similar notice requirement."<sup>40</sup> This unique requirement, she noted, "is an effective procedural trap for those who have not figured out that the requirements for certiorari review by a Florida court can be found in a county ordinance instead of the Florida appellate rules."<sup>41</sup> The result of those hidden provisions was: "In the rest of the state, the certiorari jurisdiction of the circuit court is invoked simply by filing a petition in the circuit court in accordance with the appellate rules within thirty days. In Orange County, thirty days has shrunk to ten days . . . ."<sup>42</sup>

The court, however, resolved the apparent conflict by a straightforward analysis of the proper relationship between statutory and common law certiorari. That relationship, simply put, is that "[t]he remedy of statutory certiorari is independent and cumulative to common law certiorari. Common law certiorari is available if a statutory remedy fails."<sup>43</sup>

In *Splash & Ski*, Judge Griffin also supplied an analytical framework that can correct the deficiencies in and potential constitutional problems raised by the First District in *Emerald Acres I* and *II*. Judge Griffen reasoned "certain statutory notice requirements are substantive, not procedural, and create a valid condition precedent rather than an impermissible intrusion into the court's exclusive rule making power."<sup>44</sup> These requirements, however, "are not jurisdictional . . . [if] a condition precedent is not met, the court does have jurisdiction of the cause; the case is simply subject to dismissal if the condition precedent is not satisfied . . . ."<sup>45</sup>

39. *Id.* at 494.

40. *Id.* at 494 n.9.

41. *Splash & Ski*, 596 So. 2d at 495 n.12.

42. *Id.* at 494-95.

43. *Id.* at 494 (citing *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 942 (Fla. 5th Dist. Ct. App.), *appeal dismissed*, 537 So. 2d 568 (Fla. 1988)).

44. *Id.* at 495.

45. *Id.* (citing *Hospital Corp. of Am. v. Lindberg*, 571 So. 2d 446, 448 (Fla. 1990)).

In appellate review, on the other hand, a notice requirement, "is not a condition precedent to accrual of a cause of action."<sup>46</sup> Rather, "petitioner's rights have been determined . . . [and] [w]hat petitioner now seeks is appellate review of the Board's decision."<sup>47</sup> The Judge noted: "There are no substantive 'conditions precedent' to appellate review—the courts are open to all who follow the appellate rules and pay the filing fee. The state constitution specifically identifies the time for seeking appellate review to be a matter of 'practice and procedure.'"<sup>48</sup>

The First District's analysis of the remedy provisions of the LGCPA has, in light of *Splash & Ski*, created additional uncertainty in Florida land use law.<sup>49</sup> The district courts are now in conflict over the viability of common law certiorari in post LGCPA litigation. The initial issue is primarily legislative intent, while the secondary issues involve significant constitutional questions arising under the separation of powers doctrine. They include the constitutional subject matter jurisdiction of the circuit court and the exclusive appellate rulemaking jurisdiction of the supreme court. Adequate discussion of the Legislature's intent concerning the remedy provisions requires a detour into nuances of the administrative law of access or standing. It will also be necessary to compare, contrast, and distinguish certiorari from trial proceedings in the circuit court.

### III. STANDING, ACCESS, PARTIES, AND REMEDIES: A WALK ON THE WILD SIDE OF ADMINISTRATIVE LAW

The LGCPA remedy provisions for review of local government land use decisions, in essence, are a curious blend of the administrative law of standing or access and traditional notions of judicial review and remedies. The Act's provisions in this regard might be likened to a legislatively created witch's brew of procedural complexity. That cauldron, like

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46. *Splash & Ski*, 596 So. 2d at 495.

47. *Id.*

48. *Id.* (citing FLA. CONST. art. V, § 2(a)).

49. The Second and Fifth Districts view common law certiorari as a cumulative remedy. See *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996, 999 (Fla. 2d Dist. Ct. App. 1993); *Splash & Ski, Inc. v. Orange County*, 596 So. 2d 491, 493 (Fla. 5th Dist. Ct. App. 1992); *Snyder v. County Comm'rs*, 595 So. 2d 65, 76 (Fla. 5th Dist. Ct. App. 1991) *overruled by* *Board of County Comm'rs v. Snyder*, 19 Fla. L. Weekly S17 (Oct. 7, 1993). However, the Fourth District has aligned itself with the First District's approach in *Emerald Acres I and II*. See *Jensen Beach Land Co. v. Citizens for Responsible Growth of the Treasure Coast*, 608 So. 2d 509 (Fla. 4th Dist. Ct. App. 1992).

MacBeth's,<sup>50</sup> is now boiling in Florida's appellate courts. A powerful ingredient in the brew is the question of proper parties in any proceeding under the Act.

A. *Standing or Access Under the LGCPA: Hail, Hail, the Gang's All Here*

The LGCPA judicial review provisions permit an "aggrieved or adversely affected party"<sup>51</sup> to seek injunctive or other relief against *any local government* to prevent such *local government* from taking any action on a development order.<sup>52</sup> An aggrieved or adversely affected party is defined as "any person or local government which will suffer an adverse effect to an *interest* protected or furthered by the local government comprehensive plan . . . ."<sup>53</sup> Protected interests include "health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, . . . equipment or services, or environmental or natural resources."<sup>54</sup> These interests, under LGCPA remedy provisions, "may be *shared* in *common* with other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons."<sup>55</sup> The Act's administrative review provisions,<sup>56</sup> in turn, allow "substantially affected persons" to challenge land development decisions in a purely administrative forum.<sup>57</sup>

These administrative standing or access concepts were developed to ensure "[e]xpansion of public access to the activities of governmental agencies."<sup>58</sup> Under Florida's Administrative Procedure Act, these agency activities are, for the most part, quasi-legislative rulemaking. Substantially affected persons include trade associations,<sup>59</sup> interest groups,<sup>60</sup> and even

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50. WILLIAM SHAKESPEARE, *MACBETH* act 4, sc.1.

51. FLA. STAT. § 163.3215(1) (1991).

52. *Id.*

53. *Id.* § 163.3215(2) (emphasis added).

54. *Id.*

55. *Id.* (emphasis added).

56. FLA. STAT. § 163.3213 (1991).

57. *Id.* § 163.3213(2)(a). This term is not defined in the section and has been the source of considerable confusion under chapter 120 of the Florida Statutes Administrative Procedure Act. See *Cortese v. School Bd. of Palm Beach County*, 425 So. 2d 554, 556 n.4 (Fla. 4th Dist. Ct. App. 1982) (citing Judith S. Kavanaugh, *Administrative Standing Under Chapter 403: What Does the Jerry Case Mean*, 53 FLA. B.J. 729, 730-31 (1979)).

58. *Florida Home Builders Ass'n v. Department of Labor*, 412 So. 2d 351, 352 (Fla. 1982).

59. See *id.*

parents of school age children.<sup>61</sup> The Act's access or standing definitions are clearly borrowed and are much broader than classical judicial notions of standing.<sup>62</sup> Indeed, the late Professor Patricia Dore, a leading authority on the Act and its access provisions, argued that traditional judicial notions of standing are not applicable in the administrative law context.<sup>63</sup> Reviewing courts, in her view, should disregard those concepts and apply an "access test" to administrative proceedings.<sup>64</sup> The appropriate test employed in a functional manner looks to the specific statute to determine who should be granted access to agency rule making.<sup>65</sup>

The LGCPA remedy provision, viewed through the Administrative Procedure Act's access filter, becomes much more comprehensible. It emerges as a broad access mechanism that permits interested groups, as defined by the Act, to mount a challenge to land use decisions of local governments. Challenges may be mounted in either an administrative or judicial forum, but the Act's provisions are the exclusive remedy to interested groups or individuals. The notice provisions, as conditions precedent to filing, serve the salutary effect of putting a local government on notice of a possible challenge to a land use decision.<sup>66</sup> To allow a non-applicant to challenge a land use decision of a local government seems more consistent with the Act's own terminology. Further, the Act apparently would allow a legislatively defined adversely affected or aggrieved party to bring an action or administrative proceeding against *a local government* without naming the applicant as a party.<sup>67</sup> The applicant could conceivably intervene in the proceeding but appears not to be an indispensable party. Judge Kahn's analysis is also supported, once again, by the remedy terminology of the Act. The Act provides for "injunctive or other relief,"

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60. See *Farmworkers Rights Org. Inc. v. Department of Health & Rehabilitative Servs.*, 417 So. 2d 753 (Fla. 1st Dist. Ct. App. 1982).

61. See *Cortese*, 425 So. 2d at 555.

62. Standing in classical terms is the right of a party to bring or defend a particular action. As Trawick notes, "[t]o have standing a person must have a cause of action that he can assert and *personal stake* in the outcome . . . ." HENRY P. TRAWICK, *FLORIDA PRACTICE AND PROCEDURE* § 4-15 (1992) (emphasis added).

63. See Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 967, 993 (1986) (suggesting a functional analysis that will ensure broad access to agency activity principal rulemaking).

64. *Id.*

65. *Id.* at 984-85; see also Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767, 779-83 (1991).

66. See *supra* text accompanying notes 31-36.

67. See FLA. STAT. § 163.3215(1) (1991).



that suit under its provision "shall be the sole action available," and that a "condition precedent" to institution of an action shall be a "verified complaint."<sup>68</sup> This legislative language, together with the broad definition of adversely affected parties, clearly envisions a trial court remedy for a non-applicant. Extension of the exclusivity provisions to exclude constitutionally based appellate jurisdiction of the circuit court in common law certiorari is unwarranted. Indeed, as Judge Griffin persuasively argued in *Splash & Ski*,<sup>69</sup> common law certiorari is and has been viewed historically as an appellate remedy.<sup>70</sup> The Act's language and apparent intent makes the First District's reading of the remedy provisions problematic at best.

#### IV. SNYDER AND VAILLANT REVISITED: AN EMERGING TREND SUPPORTED BY EXISTING PRECEDENT

##### A. *The Emerging Trend*

The LGCPA, as has been noted elsewhere, has transformed the post comprehensive plan land use decisions of local governments.<sup>71</sup> The initial adoption of the plan, which was a policy or quasi-legislative decision, zoning or otherwise, is now a quasi-judicial function.<sup>72</sup> The post-plan land use decision will be measured for compliance with the criteria established in the plan. This is the much praised and cursed concept of consistency. Consistency necessarily requires measuring a given post-plan land use decision against a known policy standard, the plan. This fact finding process is essentially quasi-judicial.

The Fifth District Court of Appeal recognized this fundamental transformation of the post-plan land use decision in a trail blazing decision, *Snyder v. Board of County Commissioners*.<sup>73</sup> Snyder was denied rezoning

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68. *Id.* Trawick notes that actions are classified as *ex contractu*, *ex delicto*, or statutory. TRAWICK, *supra* note 62, § 1-1. Common law certiorari, he notes, "is a form appellate review but, the proceeding is an original action." *Id.* § 36-2. Trawick further notes that "certiorari is a writ issued by a superior court to an inferior court public officer or body to review a judicial or quasi judicial order or judgment . . . ." *Id.*; see also *id.* §§ 1-5, 6-20. (supporting Judge Griffin's analysis in *Splash & Ski, Inc. v. Orange County*, 596 So. 2d 491 (Fla. 5th Dist. Ct. App. 1992)).

69. *Splash & Ski*, 596 So. 2d at 491.

70. *Id.*

71. Fennelly, *supra* note 6, at 487.

72. *Id.* at 454.

73. 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991).

by the commission even though his requested land use complied with the county's comprehensive plan. Snyder unsuccessfully sought review by common law certiorari in the circuit court. The Fifth District reversed in what can be fairly characterized as a sophisticated, comprehensive, and systematic analysis of the impact of the LGCPA on zoning and land use decisions in the post-plan context.

The *Snyder* court, employing what it and other courts have characterized as a "functional analysis,"<sup>74</sup> first noted that "broad judicial statements that all rezoning decisions are legislative in nature are out of step with the realities of zoning practice and the evolvement of zoning law."<sup>75</sup> This process, the court held, was now a "quasi-judicial review."<sup>76</sup> This conceptual result flowed from the nature of the task performed in the post-plan environment. The task, necessarily imposed by the Act, involves application of a general rule or policy (the plan) to specific individuals, interests or situations. The application of general policy criteria to a discrete person, interest, or situation was inherently quasi-judicial.<sup>77</sup> Determination of that general policy, in contrast, is a legislative function. This preliminary function, under the LGCPA, is performed when the plan is formulated and then enacted.<sup>78</sup>

The Second District, in a recent decision, *Lee County v. Sunbelt Equities II, Ltd. Partnership*,<sup>79</sup> has followed the analytical framework advanced by the Fifth District in *Snyder*. The Second District's opinion in the case candidly recognized that "Florida's appellate courts are neither unanimous nor consistent on the question whether rezonings are legislative

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74. *Id.* at 78. Lest Professor Dore and the Fifth District be accused of making a doctrine out of whole cloth, no less a luminary than Benjamin Cardozo found this type of analysis an improvement in jurisprudence. In 1921, Cardozo argued, "perhaps the most significant advance in the modern science of the law is the change from the analytical to the functional attitude. The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and the efficiency of the remedy to attain the ends for which the precept was devised." Benjamin N. Cardozo, *The Nature of the Judicial Process. Lecture II. The Methods of History, Tradition, and Sociology*, in CARDOZO ON THE LAW 73 (Legal Classics Library 1982) (quoting Roscoe Pound "The Administrative Application of Legal Standards," 44 A.B.A. REP. 441, 449 (1919)).

75. *Id.* at 75.

76. *Id.* at 80.

77. *Id.* at 77.

78. See Carl J. Peckinpough, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U. L. REV. 499, 504 (1980); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 33-45 (1977).

79. 619 So. 2d 996 (Fla. 2d Dist. Ct. App. 1993).

or quasi-judicial.”<sup>80</sup> Nor have they, in the Second District’s view, been “consistent about the method or scope of review.”<sup>81</sup> The court then, after a discussion of *Snyder’s* analytical framework, agreed that a “functional analysis”<sup>82</sup> was appropriate and that post-plan land use decisions were “quasi-judicial.”<sup>83</sup> This result and approach, to the Second District, led to “a fair and workable solution”<sup>84</sup> to issues raised by the evolving law of property rights . . . that “does not augur well for local governments who are reluctant to justify their decisions with explicit reference to evidence and public policy.”<sup>85</sup> Land use decisions, the court noted, “if reached under a veil of silence . . . are vulnerable to charges of arbitrariness or improper motive.”<sup>86</sup> Based on the foregoing, the Second District concluded “any party adversely affected by a rezoning decision is entitled to *some form of direct appellate review*.”<sup>87</sup>

Applying a functional analysis to common law certiorari in the LGCPA context leads inexorably to the conclusion that it is essentially an appellate procedure that reviews administrative action. The scope of that review is, as Judge Kahn noted, much more limited in nature but is nonetheless a review.<sup>88</sup> The circuit court is reviewing, in the consistency context, a factual determination by a local government that a proposed land use is or is not in compliance with the plan. This analysis of the proceeding is also consistent with existing supreme court precedent as set forth in the seminal case of *City of Deerfield Beach v. Vaillant*.<sup>89</sup>

### B. *The Established Precedent*

Vaillant was terminated by the City of Deerfield Beach and unsuccessfully appealed to the Civil Service Board. The board, after a full hearing, upheld his termination. He then sought and obtained a writ of common law

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80. *Id.* at 1000.

81. *Id.*

82. *Id.* at 1001 (quoting David La Croix, *The Applicability of Certiorari Review to Decisions on Rezoning*, 65 FLA. B.J. 105 (June 1991).

83. *Id.*

84. *Lee County*, 619 So. 2d at 1001. The Second District also stated that it agreed “site-specific, owner-initiated rezoning requests are sufficiently judicial in character that final administrative orders are thereafter appropriate for appellate review.” *Id.*

85. *Id.* at 1002.

86. *Id.*

87. *Id.*

88. *See Emerald Acres II*, 601 So. 2d 577, 583 (Fla. 1st Dist. Ct. App. 1992); *see also supra* notes 69, 79, 84 and accompanying text.

89. 419 So. 2d 624 (Fla. 1982).

certiorari in the circuit court. The City then attempted a plenary appeal in the Fourth District. Judge Letts, writing for the Court, treated the City's attempted appeal as a petition for certiorari and denied relief.<sup>90</sup> To Judge Letts, regardless of the nomenclature, the relief sought in the Court was effectually an appeal.<sup>91</sup> The supreme court, on appeal, followed Judge Letts' analysis noting "where full review of administrative action is given in the circuit court as a matter of right, one appealing the circuit court's judgment is not entitled to a second full review in the district court."<sup>92</sup> The supreme court, in *Vaillant*, also cited with approval a Third District decision, *Save Brickell Ave., Inc. v. City of Miami*.<sup>93</sup> *Brickell* held squarely that a zoning review in the circuit court was appellate review.<sup>94</sup>

The supreme court, in a more recent case, *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*,<sup>95</sup> reaffirmed *Vaillant's* continuing viability and expressly extended its rationale to zoning decisions.

Factually, Education Development Center, Inc. obtained certiorari relief in circuit court from an adverse zoning decision. On appeal, the Fourth District reversed and remanded the case to the circuit court. The circuit court, on remand, was to only "review the factual determination made by the agency and determine whether there is substantial competent evidence to support the agency's conclusion."<sup>96</sup> On remand, the circuit court found that there was no substantial competent evidence to support the agency's conclusion and again granted certiorari relief.

On review, the Fourth District, undauntedly granted certiorari and quashed the circuit court's order. The court held:

There was substantial evidence to support denial of the application to permit the operation of a preschool in this residential area. To find to the contrary, we conclude that the lower tribunal either reinterpreted the inferences which the evidence supported or reweighed the evidence; in either event substituting its judgment for that of the zoning board, which

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90. *City of Deerfield Beach v. Vaillant*, 399 So. 2d 1045, 1046 (Fla. 4th Dist. Ct. App. 1981).

91. See *Vaillant*, 419 So. 2d at 626. Arguably, Judge Letts was also employing a "functional analysis" to the common law certiorari proceeding in the circuit court.

92. *Id.*

93. 393 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1981).

94. *Id.* at 1198 n.1.

95. 541 So. 2d 106, 108 (Fla. 1989).

96. *City of W. Palm Beach Zoning Bd. of Appeals v. Education Dev. Ctr., Inc.*, 504 So. 2d 1385, 1386 (Fla. 4th Dist. Ct. App. 1987).

it may not properly do.<sup>97</sup>

The supreme court, on review, in effect struck the Fourth District with its own *Vaillant* petard. The supreme court, citing the Fourth District's own language in *Vaillant*, reiterated the view that "common sense dictates that no one enjoys three full appellate reviews . . . ."<sup>98</sup> The court then clearly held that "[w]hen the circuit court reviews the decision of an administrative agency under *Florida Rule of Appellate Procedure 9.030(c)(3)*, there are *three* discrete components of its *certiorari* review."<sup>99</sup> The components are "whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence."<sup>100</sup> The district court, in its review, is limited to *two* discrete components; "whether the circuit court afforded procedural due process and applied the correct law."<sup>101</sup>

## V. TOWARD SYNTHESIS

As indicated previously, the LGCPA has injected profound uncertainty into Florida law.<sup>102</sup> Indeed the entire area of land use law has been described as a legal fault line.<sup>103</sup> Given the novel and dynamic issues that are confronting the district courts and the evolving law of property rights it is not surprising that there is uncertainty. On the issues presented by *Emerald Acres I* and *II*, however, the uncertainty is a direct result of legislative draftsmanship. The Legislature, by blending administrative law standing law concepts with traditional common law remedies in the LGCPA, has thrown the bench and bar a legislative knuckleball. That the First District went down swinging is thus not the least bit surprising.

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97. *City of W. Palm Beach Zoning Bd. of Appeals v. Education Dev. Ctr., Inc.*, 526 So. 2d 775, 777 (Fla. 4th Dist. Ct. App. 1988).

98. *Education Dev. Ctr., Inc.*, 541 So. 2d at 108 (citing *City of Deerfield Beach v. Vaillant*, 399 So. 2d 1045, 1047 (Fla. 4th Dist. Ct. App. 1981)).

99. *Id.* at 108 (emphasis added).

100. *Id.* (citing *Vaillant*, 419 So. 2d at 626).

101. *Id.*

102. See *supra* text accompanying notes 6, 50.

103. John R. Nolon, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 16 (1992). "We as a society have not resolved the tension between property law and environmental rights. Controversies abound . . . the dispute . . . is a tremor running along a deep fault line in American Society." *Id.*

*Emerald Acres I* and *II* are not any less troublesome to say the least. First, the First District has badly misconstrued legislative intent with regard to the remedy provisions. There is, as indicated earlier, no basis for the court's conclusion that the Legislature intended to attempt a curtailment of common law certiorari. It is simply not there and the court was clearly guilty of apriori reasoning. It assumed the premise and reasoned formally to a conclusion. Professor Karl N. Llewellyn characterized this type of decision as a *formal*<sup>104</sup> decision making that ignored what he described as the situation sense<sup>105</sup> of a case. Holmes even more bluntly called decision making of this nature "unconscious"<sup>106</sup> because it ignored existing supreme court precedent as expressed in *Vaillant* and its progeny. Precedent clearly viewed common law certiorari as an appellate proceeding. This in turn, has resulted in decisions that fail to adequately distinguish between the trial and appellate functions and jurisdiction of the circuit court. Finally, the decisions have needlessly created separation of powers issues that potentially threaten the constitutionality of the LGCPA's remedy provisions.

The supreme court can, in the Llewellyn sense, tidy up this area by looking to the policy implications of the act and its own existing precedent. Llewellyn described this as appellate judging in the grand tradition—a Cardozo-like "drive to give clear and reasoned guidance for a whole type-situation . . . wisdom in judging where sound guidance lay. . . sensitivity to equities . . . subtlety of craftsmanship . . ."<sup>107</sup> This type of approach should recognize that the remedy provisions of the LGCPA were intended to permit broad access to defined groups. Access that would allow them, in compliance with the act conditions precedent, to challenge local governmental land use decisions. This reading of the Act's remedy provisions is consistent with, as Llewellyn describes it, the situation sense of the Act. This interpretation would also leave intact the applicant's right to challenge

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104. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 38 (1960). In the formal style "[o]pinions run in deductive form with an air or expression of single-line inevitability." *Id.*

105. *Id.* at 143. "[S]tress in first instance on the problem-situation as a type, with quest for a sound and guidesome form of rule to govern. . . ." In other words, examine LGCPA in light of the purpose of the statute as a whole and in view of existing precedent defining and explaining certiorari. *Id.*

106. Perhaps of the reasons judges do not like to discuss policy or to put a decision in terms of their views as lawmakers, is that the moment you leave the path of merely logical deduction, you loose the illusion of certainty which makes legal reasoning seem like mathematics. But that certainty is only an illusion nevertheless. OLIVER W. HOLMES, JR., *THE PATH OF THE LAW, IN THE COMMON LAW AND OTHER WRITINGS* 126 (1982).

107. LLEWELLYN, *supra* note 104, at 443.

a land use decision by common law certiorari, and avoid the constitutional issues raised necessarily in *Emerald Acres I* and *II*.

If, however, the supreme court accepts the First District's interpretation of the Act's remedy provisions, then it would appear inevitable that the constitutional issues alluded to by Judges Griffin and Kahn will have to be addressed. The balance of this article will, therefore, address these issues.

## VI. THE CONSTITUTIONAL QUAGMIRE

The separation of powers doctrine is a basic principle that underlies both the Constitutions of the United States and the State of Florida. The doctrine envisions a division of sovereign power between three distinct branches of government: Executive, Legislative and Judicial. The placement of powers in one branch, because of constitutional supremacy, precludes alteration of the division except by constitutional alteration. Thus, neither Congress nor the State Legislature may alter or exercise powers proper to a coordinate branch of government.<sup>108</sup> Simply put, the Legislature can not decide a negligence case and the Supreme Court can not pass a state budget. Nor can one branch alter the constitutional functions of another branch.

The doctrine outlined by Madison in *The Federalist Papers* received constitutional recognition in the seminal case of *Marbury v. Madison*.<sup>109</sup> Congress had attempted in the Judiciary Act of 1789 to expand the court's jurisdiction to allow the court to issue writs of mandamus. Chief Justice Marshall and the Supreme Court, quite simply, would have none of it. The Constitution, he argued, assigns and limits governmental power. Thus, since the Constitution is the "paramount law,"<sup>110</sup> a "law repugnant to the [C]onstitution is void."<sup>111</sup> Although the Constitution is paramount, the instrument itself can still be "looked into" in cases arising under the Constitution.

Florida's constitutional framers were even more explicit. Article II, section 3 (branches of government) provides that "[t]he power of the state

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108. Separation of powers in Madison's view was a basic bulwark against tyranny. Thus he observed in *The Federalist No. 47* that "[t]he accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny." MICHAEL KAMMEN, *THE ORIGINS OF THE AMERICAN CONSTITUTION* 187 (1986).

109. 5 U.S. (1 Cranch) 137 (1803).

110. *Id.* at 177.

111. *Id.* at 180.

government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”<sup>112</sup>

Despite this explicit prohibition, however, the supreme court has had to periodically grapple with legislative attempts to directly or indirectly limit or expand the jurisdiction of the courts.<sup>113</sup> In each instance, the Florida Supreme Court has resisted any legislative attempt to alter the jurisdiction conferred by the constitution on the courts of this state.

*City of Dunedin v. Bense*<sup>114</sup> is illustrative and bears a striking resemblance to *Marbury v. Madison*. In *Bense*, the Legislature had attempted to give the supreme court “‘original jurisdiction . . . by injunction or other appropriate remedy’ to prohibit the filing of any action attacking the validity of a validation decree except in the manner provided in this section.”<sup>115</sup> The supreme court in *Bense* recognized as a benchmark principle of constitutional jurisdiction that “[n]either this court nor the Legislature has the power to extend the jurisdiction of this court beyond the confines of the constitutional prescription.”<sup>116</sup> The court also recognized that “the Legislature must function within the orbit prescribed by the Constitution.”<sup>117</sup>

The supreme court, in tones similar to Marshall’s, flatly rejected the attempt, holding: “jurisdiction of the Supreme Court is conferred by the Constitution itself. It is not endowed with any common-law prerogative outside of the boundaries established by organic law. Certainly the appellate jurisdiction is clearly defined. Its original jurisdiction is stated with equal clarity.”<sup>118</sup> The Legislature, the court held, “has no power to extend jurisdiction of the Supreme Court beyond that defined in the Constitution.”<sup>119</sup> Any contrary conclusion, the court noted, “would necessarily ignore the historical doctrine of separation of powers that is so fundamental to our democratic system.”<sup>120</sup> Failure to resist would “be authority to the legislative branch of the government to regulate and control the constitu-

112. FLA. CONST. art. II, § 3.

113. Perhaps it would be appropriate to expand the famous adage that no one’s life, liberty, or property are safe while the Florida Legislature is in session to include “nor Constitutional form of government.”

114. 90 So. 2d 300 (Fla. 1956).

115. *Id.* at 301. The statute in question concerned causeway and island improvement revenue bonds. The court recognized the public interest in prompt validation. *Id.* at 301-02.

116. *Id.* at 302.

117. *Id.*

118. *Bense*, 90 So. 2d at 302.

119. *Id.*

120. *Id.* at 302-03.



tional jurisdiction of the judicial branch.”<sup>121</sup>

The converse of the foregoing principle would appear equally valid. If the Legislature could by simple legislative fiat disregard constitutional limitations and expand a court’s subject matter jurisdiction, it could with equal impunity limit jurisdiction or constitutionally based remedies, such as, injunction.

The supreme court has also resisted this latter notion as well as the former, at least with regard to its own jurisdiction.<sup>122</sup> In *Sun Insurance Office, Ltd. v. Clay*,<sup>123</sup> Chief Justice Roberts stated “it has been many times held by this court that . . . the Legislature cannot restrict or take away jurisdiction conferred by the constitution. . . .”<sup>124</sup>

Article V, section 5 of the Florida Constitution vests circuit courts with both jurisdiction to issue writs of certiorari and the power of direct review of administrative action prescribed by general law.<sup>125</sup> The analogy provided by *Bense* and *Clay* therefore, would seem clear. The Legislature must also move within its proper orbit concerning the constitutional jurisdiction of the circuit court. The constitution, the paramount document, precludes any legislative attempts to curtail jurisdiction, to issue writs of certiorari. Jurisdiction, it should be added, that the supreme court has clearly characterized as appellate in nature.

The Legislature, from a functional standpoint, can create a substantive right and remedy. Thus, the remedy provisions of the LGCPA should be viewed as a legislatively created cause of action. As such, as Judge Griffin noted, it exists apart and totally separate from the circuit court’s appellate jurisdiction, i.e., the power to issue writs of certiorari and review administrative action.<sup>126</sup> The circuit court’s jurisdiction, from a functional standpoint, can be viewed as two dimensional. The remedy provisions of the LGCPA, it is argued, properly belong in this first dimension. The second, equally constitutionally based dimension of jurisdiction, implicates circuit court appellate jurisdiction. Both dimensions, it is argued, exist

121. *Id.* at 303.

122. Cardozo described this tendency to extend itself along the lines of logical development as “an intellectual passion for *elegantia juris*, for symmetry of form and substance.” Benjamin N. Cardozo, *The Nature of the Judicial Process. Lecture I. Introduction. The Method of Philosophy*, in, CARDOZO ON THE LAW, *supra* note 74, at 34 n.28 (quoting W.G. Miller in THE DATA OF JURISPRUDENCE).

123. 133 So. 2d 735 (Fla. 1961).

124. *Id.* at 742. The holding in *Clay* seems to conflict with the holding in *Bense*. In the view of the *Clay* court, however, *Bense* was not controlling. *Id.* at 741.

125. FLA. CONST. art. V, § 5.

126. *See supra* text accompanying notes 40-47.

independently of each other and are functionally distinct. In essence the First District, in *Emerald Acres I* and *II*, has ignored the distinction and collapsed the circuit court's appellate jurisdiction into its trial jurisdiction. This is a scrambled and impermissible result at variance with the constitution and supreme court precedent as expressed in *Vaillant* and its progeny.

#### A. *Legislatively Established Appellate Filing Times*

As discussed previously,<sup>127</sup> if the time requirements governing the remedy provisions are viewed from the circuit court's trial court dimension, then the result reached in *Emerald Acres* appears sound. Quite another issue is presented if the remedy provisions' time requirements are viewed as also controlling common law certiorari in circuit court. To reiterate, the supreme court has consistently treated certiorari as an appellate remedy governed by the Rules of Appellate Procedure.<sup>128</sup> The constitution in article V, section 2(a) vests the supreme court with jurisdiction to "adopt rules for [the] practice and procedure in all courts including the time for seeking appellate review."<sup>129</sup> The filing periods, therefore, when viewed from the second or appellate dimension, intrude on the supreme court's rulemaking authority and raise a clear separation of powers issue. The supreme court has historically treated appellate filing requirements as a procedural matter exclusively within its constitutional sphere of authority.<sup>130</sup>

This historical treatment of legislatively imposed appellate filing requirements continues to be followed.<sup>131</sup> The Fourth District Court of Appeal in no uncertain terms noted "the Florida Constitution, Article V, Section 2(a), provides that the Supreme Court shall adopt rules of procedure in all courts, 'including the time for seeking appellate review.' Matters of practice and procedure within the authority of the Supreme Court may not be exercised by the Legislature."<sup>132</sup> The court found any explicit or implicit attempt of the Legislature to extend the time for direct appeal would be untimely.<sup>133</sup>

Given the historical treatment of circuit court certiorari as an appellate remedy and the supreme court's previous reaction to legislatively imposed

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127. See *supra* notes 44-47 and accompanying text.

128. See *supra* text accompanying note 101.

129. FLA. CONST. art. V, § 2(a) (emphasis added).

130. See *Markert v. Johnston*, 367 So. 2d 1003, 1005 n.8 (Fla. 1978).

131. See *In re Adoption of a Minor Child*, 570 So. 2d 340, 342 (Fla. 4th Dist. Ct. App. 1990), *aff'd*, 593 So. 2d 185 (Fla. 1991).

132. *Id.* (quoting FLA. CONST. art. V, § 2(a)).

133. *Id.*

appellate filing requirements, the result in *Emerald Acres I* and *II* appears even more tenuous. Affirmance would require that the supreme court ignore its own precedent concerning the nature of certiorari, and accept legislative intrusion into its rulemaking authority. This, on separation of powers grounds, the court has consistently refused to allow the Legislature to do.

## VII. POST SCRIPT: THE FEDERAL SPECTER

Parker, one of the parties in *Emerald Acres I*, fared much better in the federal court. The Estate and Parker, frustrated in their attempts for meaningful judicial review in state court, brought an action in district court. Parker alleged Leon County's actions were "arbitrary and capricious," and deprived them of both due process and equal protection under the Fourteenth Amendment.<sup>134</sup> The district court agreed and granted summary judgment against the County.<sup>135</sup> The district court, in a comprehensive and systematic opinion, noted that while a federal court's role in reviewing zoning cases is limited, "deprivation [of a property interest] is of constitutional stature if it is undertaken for an improper motive and by means that were pretextual, arbitrary and capricious, and without rational basis."<sup>136</sup>

It would appear, therefore, that Florida appellate courts are unwilling or unable to provide relief to litigants who are subjected, in the LGCPA context, to arbitrary and irrational administrative action by state and local agencies, the federal courts are an alternative forum. This conclusion is warranted by the district court decisions and the Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*.<sup>137</sup>

## VIII. CONCLUSION

The recent decisions of the First District in *Emerald Acres I* and *II* are at variance with the legislative intent of the LGCPA and of established Florida constitutional jurisprudence. Hopefully, the supreme court will

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134. Parker v. Leon County, No. TCA 91-40133-WS, 1992 WL 209626, at \*2 (N.D. Fla. March 18, 1992).

135. *Id.* at \*5.

136. *Id.* at \*7 (quoting Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir.), cert. denied, 112 S.Ct. 55 (1991)).

137. 112 S.Ct. 2886 (1992).

quickly correct the error.<sup>138</sup> Failure to do so could result in wholesale federal intervention in cases of this nature. A minor correction could, however, correct the problem and insure that Florida's courts are available to protect all Floridians from the arbitrary and unreasonable exercise of state power.

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138. Since this article was written, the Florida Supreme Court determined that common law certiorari was available to a property owner seeking to challenge adverse administrative action under the LGCPA. *Parker v. Leon County*, Nos. 80230, 80288, 1993 WL 530281, at \*4 (Fla. Oct. 7, 1993). The court further restricted access to the Act's remedy provisions to third party non-applicants. *Id.* at \*3. The court did not, however, reach the constitutional issues raised in this article.



# The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public

Thomas A. Pobjecky\*

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## I. INTRODUCTION

The court, under its constitutional authority to 'regulate the admission of persons to the practice of law,' has the authority to require profi-

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\* General Counsel, Florida Board of Bar Examiners. B.A. *Magna Cum Laude* 1973, University of Southern Mississippi; J.D. with honors, 1975, University of Florida. The views expressed in this article are those of the author and are not necessarily shared by members of the Florida Board of Bar Examiners or by the Supreme Court of Florida.

ciency in the law and good moral character before it admits an applicant to practice before the courts of this state. The sole purpose of these requirements is to protect the public.<sup>1</sup>

Article V, section 15 of the Florida Constitution vests the Supreme Court of Florida with “exclusive jurisdiction to regulate the admission of persons to the practice of law . . . .”<sup>2</sup> The authority of the Florida Supreme Court to regulate Bar membership is derived from the historical practices of the English courts. Such practices predate the adoption of the Florida Constitution by over six centuries.<sup>3</sup>

In 1955,<sup>4</sup> the Supreme Court of Florida established the Florida Board of Bar Examiners (“FBOBE”) pursuant to general statutory and constitutional authority.<sup>5</sup> As presently constituted, the FBOBE has fifteen members;<sup>6</sup>

1. Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454, 458 (Fla. 1978) [hereinafter *G.W.L.*].

2. FLA. CONST. art. V, §15.

3. In *In re* Fla. Bd. of Bar Examiners, 353 So. 2d 98 (Fla. 1977), the court stated: For more than six centuries prior to the adoption of our Constitution, the English courts exercised the right to determine who should be admitted to the practice of law. This authority was grounded upon the rationale that if the courts and the judicial power were to be regarded as an entity, the power to determine who should be admitted to practice law was a constituent element of that entity. This was so because the quality of justice dispensed by the courts depended in no small degree upon the integrity and competence of its Bar. An unfaithful or incapable Bar could visit reproach upon the administration of justice and upon the courts themselves.

The drafters of the Florida Constitution recognized this inherent right of the courts to regulate the admission of persons to the practice of law, imbuing the Supreme Court with exclusive jurisdiction to direct such admissions.

*Id.* at 100 (citation omitted).

4. Prior to 1955, regulation of Bar membership was “governed by Chapter 10175, Laws of Florida (1925).” This statute created the Florida Board of Law Examiners. *LaBossiere v. Florida Bd. of Bar Examiners*, 279 So. 2d 288, 289 (Fla. 1973). The statute granted a diploma privilege to graduates of Florida law schools entitling them to a waiver of the Bar examination. *Id.*

5. *Id.* (citing to FLA. CONST. of 1885, art. V, § 23; Ch. 29796, § 1, Laws of Fla. (1955); FLA. STAT. § 454.021(1)). Florida Statutes section 454.021 recognizes the court’s exclusive jurisdiction and states:

(1) Admissions of attorneys and counselors to practice law in the state is hereby declared to be a judicial function.

(2) The Supreme Court of Florida, being the highest court of said state, is the proper court to govern and regulate admissions of attorneys and counselors to practice law in said state.

FLA. STAT. § 454.021 (1991).

twelve members of The Florida Bar,<sup>7</sup> and three nonlawyer members of the general public,<sup>8</sup> who are appointed by the court.<sup>9</sup>

Attorney members of the FBOBE serve for five years and public members serve for three years.<sup>10</sup> Members of the FBOBE serve without compensation<sup>11</sup> and "devote whatever time is necessary to perform the duties of examiner."<sup>12</sup>

The FBOBE has its own staff<sup>13</sup> and maintains its administrative offices in Tallahassee.<sup>14</sup> The FBOBE is granted authority to "compel by subpoena the attendance of witnesses and the production of books, papers, and documents."<sup>15</sup>

The FBOBE's activities are governed by the Rules of the Florida Supreme Court Relating to Admissions to the Bar.<sup>16</sup> The Florida Supreme Court declared invalid a legislative enactment which attempted to direct the Board to undertake particular responsibilities.<sup>17</sup> The court reasoned: "As

6. FLA. SUP. CT. BAR ADMISS. RULE, art. I, § 2.

7. *Id.* Article I, section 3.a. of the Rules of the Florida Supreme Court Relating to Admissions to the Bar, states: "Attorney members shall be practicing attorneys with scholarly attainments and an affirmative interest in legal education and requirements for admission to the Bar." *Id.* § 3.a.

8. *Id.* § 2.a. Article I, section 3.a. of the Rules of the Florida Supreme Court Relating to Admissions to the Bar, states: "Public members shall be nonlawyers and shall have an academic Bachelor's Degree. It is desirable that public members possess educational or work-related experience of value to the Board such as educational testing, accounting, statistical analysis, medical or psychologically related sciences." *Id.* § 3.a. During the 1992-93 term, the public members consisted of a psychiatrist, a certified public accountant and a medical doctor.

9. FLA. SUP. CT. BAR ADMISS. RULE, art. I, § 3.

10. *Id.* § 2.

11. *Id.* § 5.

12. *Id.* § 3.c. With a minimum of nine monthly meetings each year along with special hearing panels and the twice yearly administration of the Bar examination, Board members volunteer well in excess of 200 hours each year in the performance of their duties.

13. *Id.* § 9. The Board "is a state agency under the judicial branch of the government and its employees are state employees . . ." *In re Fla. Bd. of Bar Examiners*, 268 So. 2d 371, 372 (Fla. 1972).

14. FLA. SUP. CT. BAR ADMISS. RULE, art. I, § 6.

15. *Id.* art. III, § 3.a.

16. Amendments to the rules are regularly proposed by the Board to the court. On one occasion, a petition to amend a rule provision from an interested third party was considered by the court. Florida Bd. of Bar Examiners *re* Amendment to Rules of the Sup. Ct. of Fla. Relating to Admissions to the Bar, 603 So. 2d 1160 (Fla. 1992).

17. *In re Fla. Bd. of Bar Examiners*, 353 So. 2d at 100. In that case, the Legislature attempted to include the Board in a statute requiring modification of examinations by state agencies to accommodate blind or deaf persons. *Id.* at 99. Although the court declared the



an arm of this [c]ourt, the Board is answerable solely to this tribunal.”<sup>18</sup>

## II. REQUIREMENTS OF EDUCATION AND EXAMINATION

Commencing in 1955, the Supreme Court of Florida, “in an effort to provide uniform and measurable standards by which to assess the qualifications of applicants, adopted a two-pronged system for the determination of educational fitness . . . .”<sup>19</sup> This system required all Bar applicants to graduate from an approved law school and to submit to the Bar examination.<sup>20</sup>

### A. Law Degree

A Bar applicant must possess the degree of Bachelor of Laws or Doctor of Jurisprudence from a law school approved by the American Bar Association (“ABA”).<sup>21</sup> This has been the sole educational requirement since 1992 when the Florida Supreme Court eliminated the undergraduate degree requirement.<sup>22</sup>

In *LaBossiere v. Florida Board of Bar Examiners*,<sup>23</sup> the Supreme Court of Florida affirmed its continuing reliance upon the accreditation of law schools by the ABA as “an objective method of determining the quality of the educational environment of prospective attorneys.”<sup>24</sup> The court acknowledged that it was unable to evaluate the many law schools due to “financial limitations and the press of judicial business.”<sup>25</sup>

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statute invalid as it applied to the Board, the court agreed with the commendable purpose of the statute. *Id.* at 100. The court also pointed out “that the Board has for some time given special consideration to the physically handicapped in administering the Bar examination.” *Id.* at 101.

18. *Id.* at 100.

19. *LaBossiere*, 279 So. 2d at 289.

20. *Id.*

21. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 1.a.

22. Florida Bd. of Bar Examiners *re* Amendment to Rules of the Sup. Ct. of Fla. Relating to Admissions to the Bar, 603 So. 2d 1160 (Fla. 1992). The court reasoned: “We note that the majority of other states do not have such a [undergraduate degree] requirement, and we conclude that the disputes over credentials evaluations are expensive, time-consuming, and unnecessary.” *Id.*

23. 279 So. 2d at 288.

24. *Id.* at 289.

25. *Id.* Other states have reached a similar conclusion. The Minnesota Supreme Court has stated: “[w]e have neither the time nor the expertise to investigate individually the special training of an applicant or the program offered by specified law schools, and any

In the landmark decision of *In re Hale*,<sup>26</sup> the Florida Supreme Court confronted the issue of the court's prior practice of granting waivers of the accredited law degree requirement.<sup>27</sup> After acknowledging that it had only granted nine of the last fifty-five petitions for a waiver, the *Hale* court concluded "that a seeming ad-hoc approach in the granting of waivers bears within it the appearance of discrimination . . . ."<sup>28</sup> The court then ruled that it "will no longer favorably consider petitions for waiver of section 1.b. [now 1.a.] of the Rule."<sup>29</sup>

The only exception to the accredited law degree requirement is the submission of a documented abstract of practice by an individual who has actively practiced law in another state or in the federal courts for at least ten years.<sup>30</sup> The compilation of work product consists of "samples of the quality of the applicant's work, such as pleadings, briefs, legal memoranda, corporate charters or other working papers which the applicant considers illustrative of such applicant's expertise and academic and legal training . . . ."<sup>31</sup> The FBOBE is granted "broad discretion" in deciding if a submission is sufficient.<sup>32</sup>

## B. *The Bar Examination*

The Supreme Court of Florida has mandated that "[a]ll individuals who seek the privilege of practicing law in the State of Florida shall submit to the Florida Bar Examination."<sup>33</sup> Florida has no provision for interstate

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attempt by us to do so would be inefficient and chaotic." *In re Application of Hansen*, 275 N.W.2d 790, 796 (Minn. 1978), *appeal dismissed sub nom.* Hansen v. Minnesota State Bd. of Bar Examiners, 441 U.S. 938 (1979). The Alaska Supreme Court stated: "The ABA system of accreditation is sophisticated and time-consuming. We can think of no effective substitute which could be developed at the state level without diverting impractical amounts of manpower and money into such an inquiry." *Application of Urie*, 617 P.2d 505, 508 (Alaska 1980) (Footnote omitted).

26. 433 So. 2d 969 (Fla. 1983).

27. *Id.*

28. *Id.* at 971.

29. *Id.* at 972. The court observed that its nonwaiver policy "while conceivably a hardship to some, is in the best interest of the legal profession in our state." *Id.*

30. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 1.b.

31. *Id.*

32. *Id.*

33. *Id.* art. I, § 1. An exception to such requirement appears in *In re Fla. Bd. of Bar Examiners*, 339 So. 2d 637 (Fla. 1976). In that case, the petitioner, Virgil Hawkins, had previously been denied admission to the University of Florida law school during the 1950's because of his race. *Id.* at 638. Based upon consideration of "the totality of circumstances,"

reciprocity as to Bar admissions.

In *In re Russell*,<sup>34</sup> petitioner, a member of the Massachusetts Bar and a resident of Florida, attacked Florida's lack of reciprocity as unconstitutional.<sup>35</sup> The petitioner was offended by Florida's policy requiring her to submit to an examination testing her knowledge of law even though she was a licensed lawyer in Massachusetts.<sup>36</sup>

The Supreme Court of Florida in *Russell* found petitioner's argument "utterly devoid of merit."<sup>37</sup> The court observed that "the right to practice law in State courts is not a privilege granted under the Federal Constitution."<sup>38</sup> The court further held that its Bar examination policy did not violate federal guarantees of due process and equal protection.<sup>39</sup>

The *Russell* court reaffirmed the intimate connection between the practice of law and the administration of justice. The court thus concluded: "We see it clearly as our duty to admit to this special position of obligation and trust only those applicants, whether from Florida schools or elsewhere, who can satisfactorily demonstrate their credentials through a test of competence given under our supervision and control."<sup>40</sup>

The General Bar Examination is administered by the FBOBE during the last Tuesday and Wednesday of February and July of each year.<sup>41</sup> Part A of the examination is developed by the FBOBE and consists of a combination of essay and multiple choice questions.<sup>42</sup> Part B is the Multistate Bar Examination ("MBE") and is developed by the National Conference of Bar Examiners.<sup>43</sup>

Part A is divided into six segments which must always include one segment on the Florida Rules of Civil and Criminal Procedure.<sup>44</sup> The

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the court waived the requirements for law school graduation and submission to the Bar examination. *Id.* The court did impose conditions for the protection of the public should Mr. Hawkins decide to engage in the active practice of law. *Id.* at 639. Mr. Hawkins was later disciplined by the court for incompetence and misconduct and was ultimately allowed to resign from The Florida Bar in response to a misappropriation disciplinary action pending against him. *The Fla. Bar v. Hawkins*, 467 So. 2d 998 (Fla. 1985).

34. 236 So. 2d 767 (Fla. 1970).

35. *Id.* at 767-68.

36. *Id.* at 768.

37. *Id.*

38. *Id.*

39. *In re Russell*, 236 So. 2d at 768-69.

40. *Id.* at 769.

41. FLA. SUP. CT. BAR ADMISS. RULE, art. VI, § 4.

42. *Id.* § 1.a.

43. *Id.* §§ 1.a., 3.c.

44. *Id.* § 3.c.

remaining segments come from the following subjects: Florida Constitutional Law, Federal Constitutional Law, Business Entities, Wills and Administration of Estates, Trusts, Real Property, Evidence, Torts, Criminal Law, Contracts, Family Law and Chapters 4 and 5 of the Rules Regulating The Florida Bar.<sup>45</sup>

The MBE consists of 200 multiple choice questions. It tests the following areas: Constitutional Law, Contracts, Criminal Law, Evidence, Real Property and Torts.<sup>46</sup>

Currently, the court requires a scaled score of 131 or better on the Bar examination under the compensatory model or under the individual parts from different administrations.<sup>47</sup> Both parts of the General Bar Examination along with the Multistate Professional Responsibility Examination must be successfully completed within a period of twenty-five months or the older scores are deleted.<sup>48</sup> If not previously done, a Bar applicant must file an Application for Admission to The Florida Bar (which initiates the character and fitness background investigation) within 180 days of successfully completing the Bar examination.<sup>49</sup>

Multiple calibrated readers are used to grade the essay answers "[t]o assure maximum uniformity in all grading."<sup>50</sup> Calibration is achieved during a conference for the readers held the weekend following the Bar examination. Calibration is the method for aligning multiple readers to enable them to grade answers from the same essay question utilizing the

45. *Id.* Prior to 1988, Florida constitutional law had to be tested on each examination. In accepting the Board's recommendation to move the subject of Florida constitutional law from the mandatory list to the discretionary list, the Florida Supreme Court stated:

The single comment filed in response to the publication criticized the removal of the mandatory requirement for testing Florida constitutional law separately on each Bar examination. We agree that it is important for Florida lawyers to have a knowledge of Florida constitutional law. However, we accept the representation of the Board that the proposed amendment would allow the Board greater flexibility in testing Florida constitutional law by permitting it to be included with another area on the same essay question, thereby producing higher quality questions on the subject.

*In re Fla. Bd. of Bar Examiners re Amendment to Rules of Sup. Ct. of Fla. Relating to Admissions to the Bar*, 524 So. 2d 643, 644 (Fla. 1988).

46. NATIONAL CONFERENCE OF BAR EXAMINERS, 1993 MBE INFORMATION BOOKLET (1992). The MBE is "designed to be answered by applying fundamental legal principles rather than local case or statutory law." *Id.* at 2.

47. FLA. SUP. CT. BAR ADMISS. RULE, art. VI, § 7.

48. *Id.* § 9.a.

49. *Id.* § 9.b.

50. *Id.* § 7.b.

same grading criteria.

In Florida, unsuccessful examinees do not have the right to full review of their examination papers. This rule complies with controlling law in that Florida grants unsuccessful examinees the unlimited right to retake the examination:<sup>51</sup> "The courts have held that if a state provides the unqualified opportunity to retake the Bar examination, no other type of hearing or review procedure is necessary to comply with due process."<sup>52</sup>

### III. REQUIREMENTS OF CHARACTER AND FITNESS

No person shall be recommended by the Florida Board of Bar Examiners to the Supreme Court of Florida for admission to The Florida Bar unless such person first produces satisfactory evidence to the Board of good moral character and an adequate knowledge of the standards and ideals of the profession and that such person is otherwise fit to take the oath and perform the obligations and responsibilities of an attorney.<sup>53</sup>

In *Florida Board of Bar Examiners re G.W.L.*,<sup>54</sup> the Supreme Court of Florida confronted the issue of defining the phrase "good moral character."<sup>55</sup> The court concluded that good moral character should not be restricted to acts involving moral turpitude. Such a restricted definition "would not sufficiently protect the public interest."<sup>56</sup> After observing that "the unscrupulous attorney . . . [has] frequent opportunities to defraud the client or obstruct the judicial process," the Florida Supreme Court held that the appropriate standard of inquiry into good moral character should

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51. See *Jones v. Board of Comm'rs of the Ala. State Bar*, 737 F.2d 996, 1005 n.1 (11th Cir. 1984) (Hatchett, J., dissenting); cf. *Tyler v. Vickery*, 517 F.2d 1089, 1103 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976) (discussing Georgia Bar Examination).

52. *Bailey v. Board of Law Examiners*, 508 F. Supp. 106, 110 (W.D. Tex. 1980). As observed by one court: "Even making the generous assumption that one out of every hundred applicants who take the examination fail when they should have passed due to arbitrary grading, the probability that the same individual would be the victim of error after two reexaminations is literally one in a million." *Tyler*, 517 F.2d at 1104.

53. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 2.a.

54. 364 So. 2d 454 (Fla. 1978).

55. *Id.* The historical understanding of moral turpitude was expressed in *State ex rel. Tullidge v. Hollingsworth*, 146 So. 660, 661 (Fla. 1933) as that which "involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society."

56. *G.W.L.*, 364 So. 2d at 458.

emphasize “honesty, fairness, and respect for the rights of others.”<sup>57</sup> The court has recognized “that the standard of conduct required of an applicant for admission to the Bar must have a rational connection to the applicant’s fitness to practice law.”<sup>58</sup>

### A. *Ineligibility*

The Supreme Court of Florida has imposed a judicial disability for a convicted felon who desires to practice law in Florida.<sup>59</sup> A convicted felon’s civil rights must be restored as “a necessary prerequisite to obtaining the privilege of practicing law.”<sup>60</sup> As the court has reasoned: “If one is ineligible to vote or hold public office in Florida, then he should not be eligible for admission to The Florida Bar and thereby become an officer of the courts of this State.”<sup>61</sup>

Additionally, disbarred attorneys from a foreign jurisdiction are ineligible for a minimum period of five years from the date of their disbarment.<sup>62</sup> Suspended attorneys are also ineligible to seek admission until

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57. *Id.* Justice Frankfurter expressed the legal profession’s demand for moral character among its members in the following language:

Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The Bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to “life, liberty and property” are in the professional keeping of lawyers. It is a fair characterization of the lawyer’s responsibility in our society that he stands “as a shield,” to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth— speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as “moral character.”

Schwartz v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

58. *G.W.L.*, 364 So. 2d at 458.

59. *See* The Fla. Bar v. Clark, 359 So. 2d 863 (Fla. 1978); *In re* Fla. Bd. of Bar Examiners, 183 So. 2d 688 (Fla. 1966).

60. *Clark*, 359 So. 2d at 864.

61. *In re* Fla. Bd. of Bar Examiners, 350 So. 2d 1072, 1073 (Fla. 1977).

62. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 2.f. The minimum five-year period of disqualification was selected to coincide with the disqualification period for disbarred Florida attorneys. Florida Bd. of Bar Examiners *re*: Amendment to Rules of the Sup. Ct. of Fla. Relating to Admissions to the Bar, 578 So. 2d 704, 707 (Fla. 1991). If a foreign jurisdiction indefinitely disbars an attorney, then such attorney will be prohibited from practicing law in Florida as long as the disbarment continues. Florida Bd. of Bar Examiners

the expiration of their period of suspension.<sup>63</sup> A person must be at least eighteen years of age to be recommended for admission to The Florida Bar.<sup>64</sup>

### B. *Background Investigation*

Without exception, the FBOBE "shall conduct an investigation and otherwise inquire into and determine the character, fitness and general qualifications of every applicant."<sup>65</sup> The FBOBE is authorized to obtain by subpoena such information as necessary to conduct a thorough investigation.<sup>66</sup>

In conducting its investigation, the FBOBE uses an extensive program of contacting primary and secondary sources. An average of thirty-five to forty written inquiries are mailed out on each application. References, former employers, and secondary sources listed by the first two sources are among the individuals contacted. Follow-up contacts by letter or phone are routinely done for sources who fail to respond or who express a reluctance to respond fully. An absolute privilege is extended to communications from individuals solicited by the FBOBE regarding the character and fitness of a Bar applicant.<sup>67</sup>

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re R.L.V.H., 587 So. 2d 462 (Fla. 1991).

63. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 2.g.

64. *Id.* § 2.c. On the one occasion for the requirement to be applicable, the Bar applicant had graduated from law school at age sixteen, had passed the Bar examination, and was qualified for admission at age seventeen. Upon the entry of a court order removing the applicant's disability of non-age, the FBOBE recommended, and the Florida Supreme Court granted, his admission.

65. *Id.* § 3.a.

66. *Id.*

67. *Dugas v. City of Harahan, La.*, 978 F.2d 193, 199 (5th Cir. 1992), *cert. denied sub nom. Bougere v. Ferrara*, 114 S. Ct. 60 (1993). In that case, Gary Bougere (a former Bar applicant) brought suit for defamation in federal district court in Louisiana against an individual who had responded to the Board's inquiries regarding Bougere's fitness to be a Florida attorney. Bougere eventually obtained a jury verdict awarding him \$75,000 in actual damages and \$25,000 in punitive damages. In reversing the judgment and holding that the communications to the Board were absolutely privileged, the United States Fifth Circuit Court of Appeals reasoned that if individuals responding to the Board's inquiry "were not absolutely immune from defamation liability for statements bearing upon a Bar applicant's character and fitness, they would shrink from the Board's request for such information. In that event, Florida's vitally important interest in ensuring an applicant's character and fitness would be thwarted." *Id.* at 198.

## 1. The Bar Application

The filing of the Application for Admission to The Florida Bar initiates the background investigation.<sup>68</sup> The application is currently thirteen pages and contains thirty-three inquiries, including questions regarding such matters as past residences, employment history, financial obligations, litigation, criminal arrests, and traffic violations.<sup>69</sup>

The Bar application also elicits information concerning whether an applicant has ever been dependent upon drugs or alcohol or has ever obtained mental health treatment.<sup>70</sup> The constitutionality of the Board's inquiries into the area of an applicant's mental health survived a legal challenge based upon an applicant's claim of right of privacy.<sup>71</sup>

In upholding the use of mental health related questions, the Supreme Court of Florida reasoned:

It is imperative for the protection of the public that applicants to the Bar be thoroughly screened by the Board. Necessarily, the Board must ask questions in this screening process which are of a personal nature and which would not otherwise be asked of persons not applying for a position of public trust and responsibility. Because of a lawyer's constant interaction with the public, a wide range of factors must be considered which would not customarily be considered in the licensing of tradesmen and businessmen. The inquiry into the applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder . . . furthers the legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. The pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities.<sup>72</sup>

The court further found that the use of such inquiry was the least intrusive

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68. FLA. SUP. CT. BAR ADMISS. RULE, art. IV, § 6.

69. See Application for Admission to The Fla. Bar. Applicants who are admitted to practice in another jurisdiction are required to respond to several additional inquiries. *Id.*

70. See *id.* Regarding an applicant's mental and emotional fitness to practice law, the FBOBE recognizes the beneficial aspects of mental health treatment. A prelude to the mental health inquiries on the Bar application states in part: "The Board assures each applicant that the Supreme Court, consequent upon the Board's recommendation, regularly admits applicants with a history of both mental ill-health and utilization of the services of mental health professions . . . . The Board encourages applicants to seek the assistance of mental health professionals, if needed." *Id.*

71. Florida Bd. of Bar Examiners *re: Applicant*, 443 So. 2d 71 (Fla. 1983).

72. *Id.* at 75.



method to achieve Florida's compelling state interest of licensing only fit individuals in the practice of law.<sup>73</sup>

## 2. Confidentiality

It is undisputed that the FBOBE gains access to highly sensitive information from disclosures by Bar applicants and from third parties. Information maintained by the FBOBE is actually the property of the Supreme Court of Florida.<sup>74</sup> The court has declared such information to be confidential except as otherwise authorized.<sup>75</sup>

The desire to keep confidential the personal information supplied by a Bar applicant to the FBOBE is apparent. Such confidentiality hopefully encourages applicants to make full and fair disclosures of all information requested by the Bar application.

The need for confidentiality of information received from third party sources is essential if the FBOBE is to continue to conduct a thorough background investigation of Bar applicants. The Supreme Court of Florida recognized such need in its unanimous decision in *Florida Board of Bar Examiners re: Interpretation of Article I, Section 14d of the Rules of the Supreme Court Relating to Admissions to the Bar*.<sup>76</sup>

In that case, an interpretation was sought by the FBOBE in response to an order by the United States District Court for the Northern District of Florida requiring production by the FBOBE of confidential information and documents to a former Bar applicant.<sup>77</sup> The federal district court had interpreted a provision of the Florida Supreme Court's rule on confidentiality to authorize disclosure to a Bar applicant "any documents or exhibits which are before the Board and which are used by the Board at, or as a basis for, an investigative hearing."<sup>78</sup>

In its decision, the Supreme Court of Florida expressly rejected the federal court's interpretation.<sup>79</sup> The court held that the FBOBE's raw investigative materials and staff prepared reports are not disclosable to a Bar

73. *Id.*

74. FLA. SUP. CT. BAR ADMISS. RULE, art I, § 14. The Board serves as the custodian of all the records on behalf of the Court. *Id.*

75. *Id.*

76. 581 So. 2d 895 (Fla. 1991).

77. *Id.* The underlying federal suit was brought by former Bar applicant Gary Bougere. See *supra* note 67.

78. *Florida Bd. of Bar Examiners re: Interpretation of Article I, Section 14d of the Rules of the Supreme Court Relating to Admissions to the Bar*, 581 So. 2d at 896.

79. *Id.* at 897.

applicant. The court reasoned “that unless the board’s investigative files are held in confidence, many of those from whom the board seeks information concerning applicants would be unwilling to candidly respond.”<sup>80</sup>

### 3. Truthfulness and Absolute Candor

Courts have recognized that honesty, truthfulness, and candor are essential qualities for individuals wishing to practice law. The Court of Appeals of Maryland observed that “no moral character qualification for Bar membership is more important than truthfulness and candor.”<sup>81</sup> The Supreme Court of Delaware acknowledged that although “[g]ood moral character has many attributes, . . . none are more important than honesty and candor.”<sup>82</sup> The Supreme Court of New Jersey enumerated the character traits required of each Bar applicant including “honesty and truthfulness, trustworthiness and reliability.”<sup>83</sup>

Beginning in 1991, the Supreme Court of Florida has issued several published opinions which have emphasized the importance of an applicant’s duty to be truthful and candid with the Board.<sup>84</sup> As the court emphatically stated in one decision: “This Court will not tolerate a lack of candor from Bar applicants.”<sup>85</sup> A Bar applicant’s lack of veracity or candor is sufficient grounds to warrant denial of admission to The Florida Bar.<sup>86</sup>

In addition to reflecting negatively upon a Bar applicant’s character and truthfulness, a lack of candor also adversely impacts the Board’s screening process. As observed by the Supreme Court of New Jersey in *In re Application of Jenkins*:<sup>87</sup>

We believe that Jenkins’ pattern of nondisclosure evidences a serious lack of fitness to practice law. Jenkins’ actions go to the integrity of the admission system. If a candidate conceals the truth or misleads the

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80. *Id.*

81. Application of Allan S., 387 A.2d 271, 275 (Md. 1978).

82. *In re Green*, 464 A.2d 881, 885 (Del. 1983) (emphasis added).

83. *In re Application of Matthews*, 462 A.2d 165, 174 (N.J. 1983).

84. See, e.g., Florida Bd. of Bar Examiners *re R.B.R.*, 609 So. 2d 1302 (Fla. 1992) [hereinafter *R.B.R.*]; *In re Florida Bd. of Bar Examiners re: J.A.F.*, 587 So. 2d 1309 (Fla. 1991) [hereinafter *J.A.F.*]; Florida Bd. of Bar Examiners *re J.H.K.*, 581 So. 2d 37 (Fla. 1991) [hereinafter *J.H.K.*]; Florida Bd. of Bar Examiners *re R.D.I.*, 581 So. 2d 27 (Fla. 1991) [hereinafter *R.D.I.*].

85. *R.B.R.*, 609 So. 2d at 1304.

86. *J.H.K.*, 581 So. 2d at 39 (“We further agree that the evidence of good character and rehabilitation presented by petitioner did not sufficiently offset his lack of veracity.”).

87. 467 A.2d 1084 (N.J. 1983).

Committee concerning events in his past that adversely affect his character, the process for reviewing candidates will collapse and no purpose will be served. The purpose of withholding certifications is not to punish the candidate but to protect the public and preserve the integrity of the Courts.<sup>88</sup>

### C. *Formal Proceedings*

After completing its investigation of a Bar applicant, which may include the applicant's appearance at an investigative hearing,<sup>89</sup> the Florida Board of Bar Examiners can either determine that the applicant has established the necessary qualifications for admission to The Florida Bar; that further investigation is necessary; or file specifications charging the applicant with matters that would preclude the applicant from admission to The Florida Bar.<sup>90</sup> "Specifications" is the term for the document which contains formal allegations of misconduct which, if proven, could result in an unfavorable recommendation by the Board.<sup>91</sup>

#### 1. Formal Hearings

Applicants who have had specifications served upon them are entitled to a formal hearing before a panel of no less than five members of the FBOBE. Except with the applicant's consent, the hearing panel cannot include any member who previously participated in an investigative hearing for such applicant.<sup>92</sup>

Formal hearings are adversary proceedings. Applicants appearing for a formal hearing are entitled to the following rights: representation by legal counsel, timely release of witness and exhibit lists by the FBOBE's attorney, access to the FBOBE's subpoena powers, cross-examination of witnesses called by the FBOBE's attorney, and presentation of witnesses and exhibits on the applicant's behalf.<sup>93</sup> The technical rules of evidence are not

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88. *Id.* at 1090.

89. Investigative hearings are held before at least three members of the Board. Following an investigative hearing, the panel makes its recommendation to the full Board as to what action should be taken. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 3.a.

90. *Id.* §§ 3.b.(1), (2), (3). *See also infra* notes 121-124 and accompanying text regarding conditional admissions.

91. FLA. SUP. CT. BAR ADMISS. RULE, art III, § 3.b.(3).

92. *Id.* § 3.f.

93. *See Florida Bd. of Bar Examiners re: Interpretation of Article I, Section 14d of the Rules of the Supreme Court Relating to Admissions to the Bar*, 581 So. 2d at 897.

applicable to a formal hearing before the FBOBE.<sup>94</sup>

Following the receipt of evidence and argument by the parties, the formal hearing panel enters its findings of fact and conclusions of law. The panel's decision must be based upon the evidence introduced into the record. In addition to recommendations for or against the applicant's admission, the panel may withhold its final decision for further evidence of rehabilitation<sup>95</sup> or petition the Supreme Court of Florida for additional time to conduct further investigation.<sup>96</sup>

## 2. Burden of Proof

The controlling principles regarding the burden of proof in Bar admission proceedings were discussed by the court in *Coleman v. Watts*.<sup>97</sup> In that case, the FBOBE notified the applicant of its decision that "he did not meet the requirements for admission to The Florida Bar."<sup>98</sup> The Board's notice failed to specify any grounds for its unfavorable decision.

The *Coleman* court recognized the burden of Bar applicants to produce satisfactory evidence of their character and fitness. Once an applicant makes a prima facie showing, however, the burden of coming forward with evidence shifts to the FBOBE.<sup>99</sup>

In holding that the procedure used by the FBOBE failed to provide due process, the *Coleman* Court held:

[I]t is incumbent upon the board to sustain its ruling by *record* evidence and not by mere assertions that it is possessed of confidential information which shows the applicant to be unfit; and if the record consists only of evidence supplied by the applicant, then such evidence must demonstrate that the board's dissatisfaction with his application rests on valid grounds and not upon mere suspicion.<sup>100</sup>

Although its decision must be supported by record evidence, the FBOBE's findings need not be proven beyond a reasonable doubt.<sup>101</sup> The

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94. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 3.f.

95. *Id.* § 3.f.(4).

96. *Id.* § 3.g.

97. 81 So. 2d 650 (Fla. 1955).

98. *Id.* at 651.

99. *Id.* at 655.

100. *Id.*

101. Florida Bd. of Bar Examiners *re: L.K.D.*, 397 So. 2d 673, 675 (Fla. 1981) [hereinafter *L.K.D.*].

standard of proof for the Board often articulated by the Florida Supreme Court is one of "competent and substantial evidence."<sup>102</sup> As any other trier of fact, the Board may rely upon circumstantial evidence,<sup>103</sup> and may accept or reject the testimony of a witness or applicant.<sup>104</sup>

### 3. Review by the Supreme Court of Florida

A Bar applicant who receives an unfavorable recommendation has a right of review by the Florida Supreme Court.<sup>105</sup> In conducting such review, the court is not precluded "from reviewing the factual underpinnings of [the FBOBE's] recommendation, based on an independent review of the record developed at the hearings."<sup>106</sup>

The Court has also recognized differing standards applicable to Bar admission proceedings and disciplinary proceedings.<sup>107</sup> Thus, a Bar applicant is held to a higher standard of character and fitness than a practicing attorney.<sup>108</sup> Furthermore, denial of admission to The Florida Bar is not the same as disbarment.<sup>109</sup> After two years from the issuance of the Board's recommendation, an applicant may reseek admission upon a showing of rehabilitation.<sup>110</sup>

### 4. Rehabilitation

In response to specifications, or when seeking readmission after having been previously denied, a Bar applicant is permitted to present evidence of rehabilitation.<sup>111</sup> Rehabilitative evidence is permissible to address the

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102. See, e.g., *R.B.R.*, 609 So. 2d at 1304; *J.A.F.*, 587 So. 2d at 1311; Florida Bd. of Bar Examiners *re* H.H.S., 373 So. 2d 890, 892 (Fla. 1979) [hereinafter *H.H.S.*].

103. See, e.g., Florida Bd. of Bar Examiners *re* C.W.G., 617 So. 2d 303, 305 (Fla. 1993) [hereinafter *C.W.G.*]; *R.D.I.*, 581 So. 2d at 29.

104. See *R.D.I.*, 581 So. 2d at 30 (The court stated, "[T]he Board did not have to believe the petitioner's version of events.").

105. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 4.b.

106. *L.K.D.*, 397 So. 2d at 675 (citations omitted).

107. *H.H.S.*, 373 So. 2d at 892.

108. *Id.*; Florida Bd. of Bar Examiners *re* Eimers, 358 So. 2d 7, 9 n.1 (Fla. 1978). For a discussion of the rationale for a higher standard for Bar applicants, see *Frasher v. West Virginia Board of Law Examiners*, 408 S.E.2d 675, 680 (W. Va. 1991).

109. *H.H.S.*, 373 So. 2d at 892.

110. See *C.W.G.*, 617 So. 2d at 305; *H.H.S.*, 373 So. 2d at 892; FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 4.d.

111. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 4.e.

issue of "an applicant's present fitness to practice law."<sup>112</sup> Evidence of rehabilitation must be clear and convincing.<sup>113</sup> As observed by the Supreme Court of Oregon:

[T]his court's primary responsibility is to the public, to see that those who are admitted to the Bar have the sense of ethical responsibility and the maturity of character to withstand the many temptations which they will confront in the practice of law. If we are not convinced that an applicant can withstand these temptations, we would be remiss to admit the applicant. Doubt of consequence must be resolved in favor of the protection of the public.<sup>114</sup>

Florida provides Bar applicants with specific guidance on what is required to establish rehabilitation.<sup>115</sup> Such requirements include positive contributions to society.<sup>116</sup> "The requirement of positive action is appropriate for applicants for admission to the Bar because service to one's community is an implied obligation of members of the Bar."<sup>117</sup>

If the evidence of rehabilitation is convincing, then admission to the Bar is appropriate regardless of the seriousness of the past misconduct.<sup>118</sup> Thus, a convicted drug dealer who has demonstrated full rehabilitation "should not be denied the privilege of practicing law solely because of a past mistake which is no longer relevant to the issue of his admission to the Bar."<sup>119</sup> However, as one court recognized: "[I]n the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make."<sup>120</sup>

## 5. Conditional Admission

Alarmed by the growing number of applicants with psychiatric, drug and alcohol problems, the FBOBE undertook an in-depth study of this area during the spring and summer of 1985. The FBOBE sought and received professional advice from experts in the area of substance abuse. The

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112. *Matthews*, 462 A.2d at 176.

113. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 4.e.

114. *In re Taylor*, 647 P.2d 462, 467 (Or. 1982).

115. FLA. SUP. CT BAR ADMISS. RULE, art. III, § 4.e.

116. *See id.* § 4.e.(7).

117. *Id.*

118. *See, e.g., In re Diez-Arguelles*, 401 So. 2d 1347, 1350 (Fla. 1981).

119. *Id.*

120. *Matthews*, 462 A.2d at 176.

FBOBE's efforts culminated in February, 1986 with the submission of a proposed rule change for the court's consideration.

The FBOBE's proposal sought approval from the court to establish a program of conditional admission to the Bar for applicants with a history of alcohol or drug abuse, or a history of a serious psychological disorder. In support of its proposal, the Board reasoned in part:

In dealing with applicants who have experienced drug or alcohol-related problems or serious psychological disorders, the Board must be conscious of both the rights of the individual applicant and the protection of the public interest. Unrestricted admission of such an applicant can have catastrophic consequences. A client's legal affairs, funds and even personal liberty are all jeopardized by the actions of an impaired attorney. However, the wholesale denial of applicants with these problems is not an acceptable solution.<sup>121</sup>

After requesting and subsequently receiving a mutually agreeable proposal from the FBOBE and The Florida Bar, the Supreme Court of Florida approved the conditional program on December 4, 1986.<sup>122</sup> Since 1985, after recommendations by FBOBE, the court has approved over 135 confidential conditional admissions.<sup>123</sup>

Florida has led the country with its progressive program of conditional admission. As observed by the Chair of the National Conference of Bar Examiners: "It is time that appropriate Bar admission authorities in other states recognize the need for conditional licensing."<sup>124</sup>

#### IV. CONCLUSION

The Bar admissions process in Florida is not static. Members of the FBOBE are appointed for terms of limited duration to insure that "new views" will be presented to and considered by the full membership on a continuing basis.<sup>125</sup> The inclusion of public members on the FBOBE has

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121. Pet. of FBOBE for Amend. of the R., Exhibit "A" at 4, February 13, 1986, Sup. Ct. of Fla. Case No. 68,307.

122. *In re* Florida Bd. of Bar Examiner for Amendment of the Rules of the Sup. Ct. of Fla. Relating to Admission to the Bar, 498 So. 2d 914 (Fla. 1986).

123. For a discussion of the appropriate sanction for an attorney who violates the terms of her conditional admission, see *The Florida Bar v. Roberts*, 626 So. 2d 658 (Fla. 1993).

124. Stuart Duhl, *Letter from the Chair*, B. EXAMINER, Feb. 1992, at 3.

125. FLA. SUP. CT. BAR ADMISS. RULE, art. I, § 3.b.

expanded such views to include the perspective of the nonlawyer. The new views of the Supreme Court of Florida and the FBOBE are reflected in the investigative and adjudicatory functions pertaining to a Bar applicant's character and fitness. Thus, the past issue of an applicant's sexual orientation has been relegated to an institutional memory.<sup>126</sup>

Other issues such as alcoholism, drug addiction, and mental illness are no longer overlooked or minimized, but are "directly confronted" through reasonable inquiries, professional evaluations, and conditional admissions.<sup>127</sup> While the old issues of honesty, truthfulness, and candor have been clarified and re-emphasized,<sup>128</sup> the relatively new issue of financial responsibility continues to evolve.<sup>129</sup>

On the horizon, new issues await consideration by the Florida Supreme Court and the FBOBE. Due to advances in technology, computer testing for professional licensure is quickly becoming a reality. It appears the question is no longer *if*, but *when*, as to the development of a computer adaptive version of the Bar examination. A proposal has also been made by the former president of the American Bar Association which would permit law students to sit for the Bar examination.<sup>130</sup>

Throughout these changing times, the Florida Supreme Court and the FBOBE will continue to fulfill their "constitutional responsibility to protect the public by taking necessary action to ensure that the individuals who are admitted to practice law will be honest and fair and will not thwart the

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126. Florida Bd. of Bar Examiners *re* N.R.S., 403 So. 2d 1315, 1317 (Fla. 1981) (The court stated "[P]rivate noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law."). See also *Eimers*, 358 So. 2d at 9.

127. See *supra* notes 121-126 and accompanying text. In *The Fla. Bar v. Larkin*, 420 So. 2d 1080, 1081 (Fla. 1982), the Florida Supreme Court "directly confronted" the issue of alcoholism among the Bar's membership:

Too often, attorneys will recognize that a colleague suffers from alcohol abuse, but will ignore the problem because they do not want to hurt the individual or his or her family. This attitude can have disastrous results both for the public and for the individual attorney. If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession. This court has responsibility to assure that the public is fully protected from attorney misconduct.

*Id.*

128. See *R.B.R.*, 609 So. 2d at 1302; *J.A.F.*, 587 So. 2d at 1309; *J.H.K.*, 581 So. 2d at 37; *R.D.I.*, 581 So. 2d at 27; see also *supra* text accompanying notes 81-88.

129. See, e.g., Florida Bd. of Bar Examiners *re* S.M.D., 609 So. 2d 1309 (Fla. 1992).

130. Talbot D'Alemberte, *Remarks*. B. EXAMINER, Aug. 1992, at 28.



administration of justice.”<sup>131</sup> As stated on the seal of the FBOBE:  
“*Clemens iustitiae custodia*.”<sup>132</sup>

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131. *G.W.L.*, 364 So. 2d at 458.

132. Closely translated, the Latin phrase means: “Compassionate and vigilant protection of justice.”

# Erie and Florida Law Conflict at the Crossroads: The Constitutional Need for Statewide Stare Decisis

**Brian E. Mattis\***  
**B. Taylor Mattis\*\***

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\* Professor of Law, Southern Illinois University School of Law; Visiting Professor of Law, St. Thomas University School of Law, 1991-93; B.S., University of Florida; J.D., University of Miami; LL.M., Yale University; Member of The Florida Bar.

\*\* Professor of Law, Southern Illinois University School of Law; Visiting Professor of Law, University of Miami School of Law, 1991-93; B.A., University of Alabama; J.D., University of Miami; LL.M., Yale University; Member of The Florida and Illinois Bars.

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## I. INTRODUCTION

"There shall be a district court of appeal serving each appellate district [of Florida]."<sup>1</sup>

"The laws of [Florida] . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."<sup>2</sup>

The Rules of Decision Act,<sup>3</sup> the principles of the *Erie* doctrine,<sup>4</sup> and the Constitution of the United States require that federal courts apply state law in many situations. Perhaps the most familiar of these situations is one in which federal jurisdiction is based on diversity of citizenship. Moreover,

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1. FLA. CONST. art. V, § 4(a).

2. Rules of Decision Act, 28 U.S.C. § 1652 (1988).

3. *Id.*

4. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

state property law may be applied in cases in federal courts dealing with federal tax consequences.<sup>5</sup> State law may determine the content of a federal right in actions arising under bankruptcy law,<sup>6</sup> or in copyright law,<sup>7</sup> even though the federal courts' jurisdiction in such cases is exclusive.<sup>8</sup>

The "laws of the several states" that are to "be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply,"<sup>9</sup> include not only state constitutions and legislative enactments but also judicial decisions.<sup>10</sup> The process by which a federal court determines the content of state law on a particular issue has been discussed in numerous federal decisions and secondary commentaries.<sup>11</sup> Where the source of applicable state law is a state constitution or statute the process may not be difficult.<sup>12</sup> Where the highest court of a state has spoken clearly on a matter of state common law, the process may not be difficult. Where the only source of state law is a decision or decisions of one or more state intermediate appellate courts, the process is quite difficult. How does and should a federal court proceed when attempting to ascertain "the law of Florida" when the only source of that law is from one or more of Florida's District Courts of Appeal? How do the structure of the Florida judiciary and the precedential value accorded by Florida state courts to district court decisions affect federal courts' application of Florida law? Where the Florida district courts of appeal disagree within or among themselves, is there a "law of Florida" on point, or is Florida comprised of several sub-states with different laws on the same subject applying in different geographical areas of Florida? For that matter, how are Florida trial courts or courts of appeal to decide what is Florida law when faced with conflicting precedent? Where federal courts must apply unsettled Florida law, is certification by the eleventh circuit to the Supreme Court of Florida the final or appropriate solution? Should the Florida Constitution be amended to provide for more uniformity of state law?

The authors will explore these questions. We presuppose a working

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5. *E.g.*, *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *Blair v. Commissioner*, 300 U.S. 5, 8-10 (1937).

6. *In re Erickson*, 815 F.2d 1090, 1091-95 (7th Cir. 1987).

7. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

8. 28 U.S.C. §§ 1334, 1338 (1988).

9. *Id.* § 1652.

10. *Erie*, 304 U.S. at 64.

11. See CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 58 (4th ed. 1983) and sources cited therein.

12. Of course, state judicial decisions interpreting state constitutions or statutes may create the same problems as pure state common law.

knowledge of the general concept of stare decisis, used here synonymously with precedent, as the principle that a court will stand by its own decisions as well as by those of a higher court in a given judicial hierarchy.<sup>13</sup> Yet the modern concept of stare decisis does not mean that a point of law once decided is settled for all time. Stare decisis simply means that a decision will be followed, distinguished, or overruled by the deciding or coordinate court, as well as followed by lower courts in the same judicial system (until that decision is reversed or overruled by a higher court).

Part II will explain the structure of the Florida judiciary and set forth the status quo in terms of the precedential value accorded by Florida courts to decisions of the Florida District Courts of Appeal. Part III will examine the general “*Erie*” problem, including the early history of the doctrine and the doctrine as it was later reformed. The choice of law and forum shopping issues raised by the *Erie* doctrine will be examined not only as to interstate choice of law issues, but also as to intrastate choice of law. We will analyze a remarkable debate between two federal judges in Illinois that raised problems pertinent to Florida federal judges and litigants. Additionally, the Eleventh Circuit position regarding how federal judges should determine the content of Florida law will be discussed. Part IV will recommend amendment of article V, section 4, of the Florida Constitution to achieve statewide precedential effect for the decisions of the courts of appeal.

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13. The full phrase is *stare decisis et non quieta movere*: “[t]o adhere to precedents, and not to unsettle things which are established.” BLACK’S LAW DICTIONARY 1406 (6th ed. 1990). “This doctrine embodies a judicial policy that a ‘determination of a point of law by a court will generally be followed by a court of the same . . . rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case.’” *Brewer’s Dairy v. Dolloff*, 268 A.2d 636, 638 (Me. 1970) (quoting 20 AM. JUR. 2D *Courts* § 183 (1966)).

The Supreme Court of the United States gives several reasons for the policy of adhering to precedents:

Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

## II. STARE DECISIS: FLORIDA COURTS' TREATMENT OF DECISIONS OF DISTRICT COURTS OF APPEAL

### A. *Structure of the Florida Judicial System*

The Florida District Courts of Appeal have been constitutionally separate, distinct courts<sup>14</sup> since 1956, when the constitution first authorized appellate level of the state judiciary.<sup>15</sup> In contrast to states with a unitary system comprising a single intermediate appellate court sitting in districts, divisions, or panels, Florida's judicial structure is analogous to the federal judicial system, with separate courts of appeal.<sup>16</sup> There are five district courts of appeal, with headquarters in Tallahassee (First District), Lakeland (Second District), Dade County (Third District), Palm Beach County (Fourth District), and Daytona Beach (Fifth District).<sup>17</sup> Each district court of appeal has its own chief judge,<sup>18</sup> its own clerk,<sup>19</sup> its own marshal,<sup>20</sup> and its own official identifying seal.<sup>21</sup> The geography of the five appellate districts is shown on a map at appendix A to this article.

The foundation for understanding the Florida judicial system is the recognition of its uniqueness. In many respects, the district courts of appeal are courts of last resort, not intermediate appellate courts,<sup>22</sup> because the jurisdiction of the supreme court to review district court decisions is extremely limited.<sup>23</sup> The supreme court's mandatory jurisdiction to review

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14. FLA. CONST. art. V, § 4(a) provides: "There shall be a district court of appeal serving each appellate district."

15. *Id.* § 1 (amended 1956).

16. See generally MARLIN O. OSTHUS & MAYO H. STIEGLER, *STATE INTERMEDIATE APPELLATE COURTS* 12-15 (1980) (discussing structure of intermediate appellate courts).

17. FLA. STAT. § 35.05 (1991).

18. FLA. CONST. art. V, § 2(c); FLA. STAT. § 35.12 (1991).

19. FLA. CONST. art. V, § 4(c); FLA. STAT. § 35.21 (1991).

20. FLA. CONST. art. V, § 4(c); FLA. STAT. § 35.26 (1991).

21. FLA. STAT. § 35.09 (1991). "Each district court of appeal shall have an official identifying seal as prescribed by the supreme court." *Id.*

22. "The jurisdictional structure of Florida's appellate courts is unique." *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992).

23. *Jenkins v. State*, 385 So. 2d 1356, 1363 (Fla. 1980) (England, C.J., concurring specially); Ben F. Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA. L. REV. 80, 80 n.5 (1983); John M. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 STETSON L. REV. 479, 480 (1984); see generally Taylor Mattis, *Stare Decisis Among and Within Florida's District Courts of Appeal*, 18 FLA. ST. U. L. REV. 143 (1990) [hereinafter Mattis, *Stare Decisis Florida*] (discussing Florida's

district court decisions is limited to decisions declaring invalid a state statute or a provision of the state constitution.<sup>24</sup> The supreme court's discretionary jurisdiction to review district court decisions is limited by article V, sections 3(b)(3) and (b)(4) of the Florida Constitution, which provide that the supreme court:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or *that expressly and directly conflicts with a decision of another district court of appeal* or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or *that is certified by it to be in direct conflict with a decision of another district court of appeal*.<sup>25</sup>

A district court of appeal that renders a decision in conflict with that of another district court may prevent review by the supreme court by declining to state or "express" in the opinion that the decision "directly" conflicts (for (b)(3) jurisdiction), or declining to certify that the decision is in "direct conflict" (for (b)(4) jurisdiction).<sup>26</sup> Furthermore, a decision of a district court creates precedent. As one district court opinion said, "[w]e are one state with five districts, each of which is authorized to separately evaluate the merits of various legal rules and create legal precedent."<sup>27</sup>

The Supreme Court of Florida has recognized the precedent-creating function of district courts of appeal: "[T]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by

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unique appellate court structure).

24. FLA. CONST. art. V, § 3(b)(1).

25. *Id.* § 3(b)(3), (b)(4) (emphasis added).

26. Victor Lance, Note, *The District Courts of Appeal—After 1980 Jurisdictional Amendment: A New Obligation Toward Decisional Harmony*, 6 NOVA L. REV. 115 (1981); see generally Arthur J. England, Jr., et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980) (discussing the features of the amendment). "Section 3(b)(3) now places an increased obligation on district court judges who again have some ability to control a party's right to supreme court review." *Id.* at 181.

27. *Bamber*, 592 So. 2d at 1132.

this Court. . . .”<sup>28</sup> The operation of district court decisions as precedent must be examined from two perspectives: (1) because the precedent-creating courts are multiple, not unitary, their decisions must be examined on a horizontal plane. Is the decision of one district court of appeal binding on another?; (2) because the precedent-creating courts sit in separate districts, their decisions must be examined on a vertical plane. On what courts below a district court of appeal is its decision binding?

### B. *Horizontal Stare Decisis*

The freedom of a district court of appeal to disregard the decision of a “sister” district court is well established among the district courts<sup>29</sup> and approved in dicta by the supreme court.<sup>30</sup> A refusal to accept coordinate precedent may follow a hat-tipping statement that the coordinate court’s decision is “entitled to great weight,”<sup>31</sup> or a less deferential statement that the decision is “merely persuasive.”<sup>32</sup> But the bottom line over the years consistently has been that district courts are not bound and decline to follow other district court decisions. This is not to say that one district never follows the decisions of another. Rather, the district courts have followed

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28. *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980). The *Stanfill* court cited *Johns v. Wainwright*, 253 So. 2d 873, 874 (Fla. 1971), and *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958), which state that district courts were never intended to be intermediate courts and that district court decisions are, typically, final and absolute. The *Stanfill* phrase in the text was quoted in *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985), and most recently in *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

29. Cases cited and discussed in Mattis, *Stare Decisis Florida*, *supra* note 23, at 150 n.38. More recent cases refusing to follow a conflicting decision of a coordinate district court include: *State v. Dorian*, 619 So. 2d 311, 313 (Fla. 3d Dist. Ct. App. 1993); *State v. Agee*, 588 So. 2d 600 (Fla. 1st Dist. Ct. App. 1991), *decision approved*, 622 So. 2d 473 (Fla. 1993); *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992), *disagreed with*, *State v. Thomas*, 604 So. 2d 1277 (Fla. 5th Dist. Ct. App. 1992); *State v. Pardo*, 582 So. 2d 1225, 1227 (Fla. 3d Dist. Ct. App. 1991), *approved in part and quashed in part*, 596 So. 2d 665 (Fla. 1992); *Pimm v. Pimm*, 568 So. 2d 1299, 1300 (Fla. 2d Dist. Ct. App. 1990) (“declin[ing] to follow” Third District decision, case certified as of great public importance), *decision approved*, 601 So. 2d 534 (Fla. 1992); *Durham v. Palm Court, Inc.*, 558 So. 2d 59 (Fla. 4th Dist. Ct. App.), *appeal dismissed sub nom.* *Forster v. Durham*, 566 So. 2d 256 (Fla. 1990); *Dealers Ins. Co. v. Jon Hall Chevrolet Co.*, 547 So. 2d 325, 326 (Fla. 5th Dist. Ct. App. 1989).

30. *Weiman*, 470 So. 2d at 684.

31. *E.g.*, *Spencer Ladd’s, Inc. v. Lehman*, 167 So. 2d 731, 735 (Fla. 1st Dist. Ct. App. 1964), *modified on other grounds*, 182 So. 2d 402 (Fla. 1965).

32. *E.g.*, *McDonald’s Corp. v. Department of Transp.*, 535 So. 2d 323, 325 (Fla. 2d Dist. Ct. App. 1988).



cases from other districts that they deemed persuasive and have rejected cases with which they disagreed without any suggestion that the later decision overrules the earlier.<sup>33</sup> The "law of the district" notion is as entrenched in Florida as is the "law of the circuit" in the federal system. The perceived safety net is the supreme court's discretionary jurisdiction to resolve conflicts between districts, should an aggrieved party so choose and be financially able to seek such review. A wise man once cautioned that rules recognizing the existence of conflicts among intermediate courts as a ground for review by a top court "were designed to eliminate conflicts, not to stimulate them."<sup>34</sup>

The supreme court has said little about conflicts among districts, but in 1985 the court implied that a decision of one district does not bind another. The court said that a district court's opinion has "a binding effect on all Florida trial courts [but] . . . a persuasive effect on sister district courts."<sup>35</sup> More recently, the supreme court quoted with approval a district court's statement that "a sister district's opinion is merely persuasive."<sup>36</sup>

### C. *Vertical Stare Decisis*

Fundamental to the operation of a common-law judicial system is the trial courts' understanding of what precedent they must follow. For thirty-six years after Florida initiated a three-tiered judicial structure, no clear statewide authority existed on the issue of which trial courts were bound by which appellate decisions; however, in 1992, the supreme court spoke directly and laid the matter to rest, at least partially.<sup>37</sup> All Florida trial courts are bound by the decision of any district court that does not conflict with another district court decision.<sup>38</sup> If the court of appeal of the district in which the trial court sits has decided the issue, the trial court is bound to follow its rule, whether or not the rule conflicts with a decision of another district court.<sup>39</sup> Still unanswered is what course of action a trial court should take where other district courts are in conflict on an issue and the

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33. See *supra* note 29.

34. Walter Schaefer, *Foreword: Stare Decisis and the "Law of the Circuit,"* 28 DE PAUL L. REV. 565, 566 (1979). Walter Schaefer is a former Justice of the Supreme Court of Illinois.

35. *Weiman*, 470 So. 2d at 684.

36. *Pardo*, 596 So. 2d at 667 (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th Dist. Ct. App. 1976)).

37. *Id.* at 665.

38. *Id.* at 666.

39. *Id.* at 666-67.

trial court's own district is undecided.

In 1976, twenty years after the constitutional revision establishing the district courts of appeal,<sup>40</sup> the Fourth District Court of Appeal first addressed the issue of vertical stare decisis.<sup>41</sup> In *State v. Hayes*,<sup>42</sup> Chief Judge Walden "flatly stat[ed] that a Circuit Court wheresoever situate [sic] in Florida is equally bound by a decision of a District Court of Appeal regardless of its appellate district," absent a conflicting decision from the trial court's own court of appeal.<sup>43</sup> Later that same year, the First District Court of Appeal reached the opposite result in *Smith v. Venus Condominium Ass'n*,<sup>44</sup> holding that trial courts are bound only by decisions of the court of appeal of the district in which the trial courts are located.<sup>45</sup> Chief Judge Boyer, in *Venus Condominium*, reasoned that requiring trial courts to follow decisions of sister courts of appeal "could lead to utter chaos were two of our sister courts to be in conflict on a point of law raised in a trial court in this district."<sup>46</sup> He further pointed out that it would be "anomalous" for the First District Court of Appeal to reverse a trial court's decision not to follow a decision of a sister district court with which the First District Court disagreed.<sup>47</sup>

The opinions in *Hayes* and *Venus Condominium* reveal jurisprudential differences about the appropriate function of trial judges. Chief Judge Walden in *Hayes* emphasized that in order to preserve harmony, stability, and predictability in the law, trial courts must follow the holdings of higher courts.<sup>48</sup> Chief Judge Boyer in *Venus Condominium* commented: "The fact is that trial courts, as appellate courts, have the duty and obligation to follow [determine] and apply the law."<sup>49</sup>

Interestingly, the two conflicting district courts attempted to facilitate

40. FLA. CONST. art. V, §§ 1, 4.

41. *Hayes*, 333 So. 2d at 51.

42. *Id.*

43. *Id.* at 52-53.

44. 343 So. 2d 1284 (Fla. 1st Dist. Ct. App. 1976), *quashed and remanded on other grounds*, 352 So. 2d 1169 (Fla. 1977) (stating nothing on the stare decisis point). *Venus Condominium* rejected the idea of a trial court's being bound by decisions of other district courts as "novel, though without merit." *Id.* at 1285. *Hayes*, decided six months earlier, was not mentioned.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Hayes*, 333 So. 2d at 52.

49. *Venus Condominium*, 343 So. 2d at 1285.

supreme court review in each of the cases.<sup>50</sup> In the earlier opinion of *Hayes* the court said:

Since the state suggests that there is confusion and uncertainty abroad among the circuit courts as to whether they are bound to follow the decision of a foreign District Court of Appeal (a suggestion which surprises us), and since under that rationale Circuit Courts in the First, Second and Third Appellate Districts would not feel bound by this instant decision, we do hereby offer *upon appropriate application* to certify the question contained in Point I as being one of great public interest.<sup>51</sup>

In the later opinion of *Venus Condominium*, on petition for rehearing, the court certified that the decision passed upon a question of great public interest.<sup>52</sup> There is no subsequent history of the *Hayes* decision; however, the supreme court did review the *Venus Condominium* decision without commenting upon the stare decisis conflict with *Hayes*.<sup>53</sup> It is folly to assume that a conflict once created between or among districts will soon be resolved by the supreme court. Some reasons for failure to resolve conflicts are that: (1) parties run out of money or energy to litigate further;<sup>54</sup> (2) they settle the dispute; or, (3) the supreme court refuses discretionary review or does not address the pertinent conflict.

During the next sixteen years, the conflict persisted about which trial courts were bound by which appellate decisions. The First District Court remained firm in its position that trial courts within the first appellate district were bound only by First District Court decisions and those of the supreme

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50. *Id.*; *Hayes*, 333 So. 2d at 51.

51. *Hayes*, 333 So. 2d at 54.

52. *Venus Condominium*, 343 So. 2d at 1287 (referring to the substantive issue of the case).

53. *Smith v. Venus Condominium Ass'n*, 352 So. 2d 1169 (Fla. 1977). The supreme court accepted conflict jurisdiction under article V, section 3(b)(3) of the Florida Constitution based on interdistrict conflict on the substantive point. *Id.* at 1170.

54. In his concurring opinion, Justice Adknis stated:

The district courts of appeal are frequently expressly recognizing in opinions that a decision is in conflict with a sister district court. Unless one of the parties brings a petition for certiorari to . . . [the supreme court] the conflict remains in the reported case law and the trial judge is faced with the dilemma of selecting one of two conflicting district courts of appeal decisions as the proper case law.

The Florida Bar Re: Rules of Appellate Procedure, 463 So. 2d 1114, 1124 (Fla. 1984) (Adkins, J., concurring).

court.<sup>55</sup> The Second<sup>56</sup> and Fifth<sup>57</sup> Districts joined the Fourth District<sup>58</sup> in requiring trial courts to follow a decision of any district court where there was no conflicting district decision. In 1992, the Third District joined the First District in refusing to require trial courts to follow any but their "own" district decisions.<sup>59</sup> In *Pardo*, the trial court concluded that it was required to exclude a child victim's hearsay statements under the authority of a Fifth District decision<sup>60</sup> with which the trial court disagreed.<sup>61</sup> Judge Cope, writing for the Third District Court of Appeal, opined that the trial court was under no obligation to follow decisions of districts other than the Third.

55. *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 480 So. 2d 1366, 1366 (Fla. 1st Dist. Ct. App. 1985), *aff'd*, 497 So. 2d 644 (Fla. 1986) (stating nothing on the stare decisis point). The trial court sitting in the First District, where there was no decision on point, was held to have acted correctly in rejecting recent, consistent Second and Third District cases. *Shands Teaching Hosp. & Clinics*, 497 So. 2d at 646.

56. *Chapman v. Pinellas County*, 423 So. 2d 578, 580 (Fla. 2d Dist. Ct. App. 1982); *In re E.B.L.*, 544 So. 2d 333, 336 (Fla. 2d Dist. Ct. App. 1989); *cf.* *State v. Kopulos*, 413 So. 2d 1195 (Fla. 2d Dist. Ct. App. 1982) (holding that trial courts must follow the decisions of the district court in their territorial district where those decisions conflict with other district decisions); *State v. Bamber*, 592 So. 2d 1129 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992); *Pimm v. Pimm*, 568 So. 2d 1299, 1132 (Fla. 2d Dist. Ct. App. 1990), *decision approved*, 601 So. 2d 534 (Fla. 1992).

57. *Dillon v. Chapman*, 404 So. 2d 354, 359 (Fla. 5th Dist. Ct. App. 1981), *rev'd on other grounds*, 415 So. 2d 12 (Fla. 1982); *Dealers Ins. Co. v. Jon Hall Chevrolet Co.*, 547 So. 2d 325, 326 (Fla. 5th Dist. Ct. App. 1989) (noting that the trial judge acted correctly in following a decision of the Third District, but reversing the judgment because the Fifth District disagreed with that holding). In *Jon Hall Chevrolet*, the Fifth District expressly noted a direct conflict with the Third District on a question of statutory interpretation and constitutionality. *Id.* at 326-27. There is no subsequent history of the case.

58. Recent expressions of the position of the Fourth District are *Durham v. Palm Court, Inc.*, 558 So. 2d 59, 60 (Fla. 4th Dist. Ct. App.), *appeal dismissed sub nom.* *Forster v. Durham*, 566 So. 2d 256 (Fla. 1990), which explained "[t]he Fourth District Court had not spoken on this subject, and thus the trial court was bound by the First District's *Gordon* case . . . . On the other hand, we are not bound by the *Gordon* decision and, in fact, we disagree with it . . . ." and *Dean v. Dean*, 607 So. 2d 494, 499 n.6 (Fla. 4th Dist. Ct. App. 1992), *review dismissed*, 618 So. 2d 208 (Fla. 1993), which explained "[i]n the absence of controlling precedent from its own district court, any trial court in Florida, irrespective of the district in which it sits, is required to follow the decision of any other district court of appeal in Florida."

59. *State v. Pardo*, 582 So. 2d 1225 (Fla. 3d Dist. Ct. App. 1991), *approved in part, quashed in part*, 596 So. 2d 665 (Fla. 1992).

60. *Kopko v. State*, 577 So. 2d 956 (Fla. 5th Dist. Ct. App. 1991), *quashed by Pardo v. State*, 596 So. 2d 665 (Fla. 1992). *Kopko* excluded the child victim's hearsay statements, even though they satisfied Florida Statutes section 90.803(23), because the child was able to testify fully at trial. *Id.* at 962.

61. *Pardo*, 582 So. 2d at 1226.

[D]ecisions of other district courts of appeal should be treated by trial courts in the same way that this court treats such decisions: as persuasive authority. Such decisions are deserving of careful consideration by trial courts in this district, but are not binding on them . . .

The trial court's ultimate obligation is to ascertain and follow the law. The interests of justice are best served where trial judges have the opportunity and responsibility to reach a reasoned decision after consideration of all pertinent authority. In the present case there were sound reasons to disagree with the *Kopko* decision, and the trial court was entitled to do so.<sup>62</sup>

The Second District Court was aware that the Third District had just freed its circuit courts to disregard precedent of other districts, when the Second District decided *Bamber*.<sup>63</sup> The Second District used *Bamber* to "reaffirm [its] . . . conviction that the circuit courts within the Second District must obey controlling precedent from the other districts."<sup>64</sup> A footnote following this quotation revealed how potentially divisive the issue of vertical stare decisis had become:

Ironically, we reaffirm this belief by requiring our circuit courts to follow a controlling precedent of the Third District, even though its circuit courts are now free to disregard the otherwise controlling precedent of this court. It has been suggested, perhaps facetiously, that we should limit . . . [the Second District rule] so that circuit courts in the Second District need only obey precedent from districts that recognize the precedential effect of our reported cases. We decline to create such a rule of inter-district *renvoi*. Hopefully, the formalized rules governing conflicts of law can be limited to conflicts between states.<sup>65</sup>

Judge Altenbernd, writing for *Bamber*, supported the decision for broadcast vertical stare decisis on the bases of Florida's judicial structure and the appropriate functioning of the tri-level courts within that state structure.<sup>66</sup> The judge pointed out that Florida is one state, albeit with five districts.<sup>67</sup> The judge further noted that district courts do create precedent, and if they create conflicts in the process the supreme court can resolve

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62. *Id.* at 1227.

63. 592 So. 2d at 1129.

64. *Id.* at 1132.

65. *Id.* at 1132 n.2.

66. *Id.* at 1132.

67. *Id.*

them.<sup>68</sup> However, the function of trial courts is not to create precedent.<sup>69</sup> A trial court's ruling is not

binding, even in the adjacent courtroom. . . . [N]o . . . [constitutional] mechanism exists to resolve conflicts among hundreds of circuit court judges. . . . [A] system in which trial courts were not bound by the only Florida precedent on a question of law would be a system promoting the rule of individual judges rather than the rule of law. At best, it would tend to create five balkanized districts confederated into a loose Floridian union.<sup>70</sup>

The court further stated:

Floridians need to know, to the greatest extent possible, that trial courts will apply the same law in Pensacola, Tampa, and Miami. Trial judges are free to vigorously express their disagreement with controlling precedent from other districts, but a workable system of jurisprudence requires that they obey that precedent until their district creates conflicting precedent.<sup>71</sup>

Once again, *Pardo* and *Bamber* reveal jurisprudential differences about the appropriate function of trial judges. Judge Altenbernd in *Bamber*, like Chief Judge Walden in *Hayes*, emphasized that in order to preserve harmony, stability, and predictability in the law, trial courts must follow the holdings of higher courts. Judge Cope in *Pardo*, like Chief Judge Boyer in *Venus Condominium*, expressed that trial judges should reach their own reasoned decision, influenced by but without constraint from decisions of other districts. The approach in *Bamber* tends toward a communitarian model, emphasizing responsibility to the state judicial system as a whole, as central to the realization of equal justice, even where the intellectual proclivities of the individual judge may run contrary to a specific result. The approach in *Pardo* tends toward rugged individualism, positing that the ultimate good will result through decision-making according to the lights of

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68. *Bamber*, 592 So. 2d at 1132. *But cf. supra* text accompanying note 54.

69. *Bamber*, 592 So. 2d at 1132.

70. *Id.*

71. *Id.* The Second District Court went on to affirm the trial court's disobeying precedent from another district because the Second District Court disagreed with the Third District on the point of law (the validity of a no-knock search). *Id.* at 1131.

each judge as a unit.<sup>72</sup>

The vertical stare decisis issue finally attracted the attention of the supreme court when the Third District Court in *Pardo* certified an express and direct conflict with *Kopko* on the issue of the admissibility of the child victim's hearsay statements.<sup>73</sup> The *Pardo* court further certified that it had passed on a question of "great public importance."<sup>74</sup> The supreme court accepted jurisdiction.<sup>75</sup> Significantly, the supreme court found that in addition to the substantive conflict about the admissibility of evidence, the Third "[D]istrict [C]ourt's opinion conflicts with the Fourth District's decision in *State v. Hayes*, and our decision in *Weiman v. McHaffie*" on the stare decisis issue.<sup>76</sup> Holding that "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts," Chief Justice Barkett cited *Weiman* and quoted from Judge Walden's Fourth District opinion in *Hayes*.<sup>77</sup>

Thirty-six years after the establishment of the courts of appeal and sixteen years after a conflict developed concerning the precedential value to be accorded district court decisions by trial courts, the supreme court thus resolved the conflict in favor of broadcast vertical stare decisis.<sup>78</sup> The Third District bowed to the supreme court's *Pardo* pronouncements a few months later, when the Third District stated that the circuit "had no choice" but to follow a Second District decision.<sup>79</sup> The Third District hastened to add, however, that "*this* court is of course free to consider the issue as an original question."<sup>80</sup> The Third District happened to "completely agree with . . . [the Second District decision, on the merits] and therefore . . . [made] it a part of the law of . . . [the Third D]istrict."<sup>81</sup> The balkanized "law of the district" lives on.

Unanswered by the supreme court in *Pardo*, or otherwise in Florida

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72. Cf. Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 2259 (1992) (contrasting the traditional view of property and takings with the communitarian perspective, which emphasized the property owners' sense of responsibility to the community for the use of their property as central to their realization of individual freedom). The story one tells depends upon the normative theory that one applies.

73. *Pardo*, 582 So. 2d at 1228.

74. *Id.*

75. See FLA. CONST. art. V, § 3(b)(4).

76. *Pardo*, 596 So. 2d at 666 (citations omitted).

77. *Id.*

78. *Id.*

79. *Allstate Ins. Co. v. Mazorra*, 599 So. 2d 739, 739 (Fla. 3d Dist. Ct. App. 1992).

80. *Id.* at 740 (emphasis added).

81. *Id.*

jurisprudence, is the question of what a trial judge should do where decisions of two or more district courts other than her own conflict and the trial judge's district is undecided on the issue. The likelihood of this situation bothered the *Venus Condominium* court, which created the conflict on the issue of vertical stare decisis in 1976.<sup>82</sup> Justice Adkins also spoke of the problem of placing a trial judge in "the dilemma of selecting one of two conflicting district courts of appeals decisions as the proper case law."<sup>83</sup>

Three or four possible rules could be established for such situations:

(1) The trial court could follow the most recent appellate decision. In effect, the most recent district court decision would overrule the earlier district court decision in all undecided districts. In other words, assume that the First District is first-in-time to decide a particular point of law. It decides that the law is *X*. The law of *X* binds all trial courts in Florida. Now the Second District Court decides that the law on that particular point is *Y*. The law of *X* is overruled in the Second District, where *Y* now becomes the law of the Second District. To the extent that trial courts within the Third, Fourth, and Fifth Districts follow the last-in-time approach, the law of *X* is also overruled in those districts by the Second District decision for the law of *Y*.

(2) The trial court could follow the first-in-time decision.<sup>84</sup> A trial court faced with the dilemma described could follow the law of *X* because the first-in-time district court to decide the issue had so ruled. Thus, the law of *Y* would bind only the Second District.

(3) The trial court could follow the decision that it considered the best reasoned or that set the best policy, according to its own rights. Moreover, it could choose and apply a rule different from that of either of the

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82. *Venus Condominium*, 343 So. 2d at 1285. The court said that requiring a trial court to follow other district courts "could lead to utter chaos were two of our sister courts to be in conflict on a point of law raised in a trial court in this district." *Id.*

83. The Florida Bar Re: Rules of Appellate Procedure, 463 So. 2d 1114, 1124 (Fla. 1984) (Adkins, J., concurring).

84. *Accord* Sowell v. Sowell, 92 S.E.2d 524, 526 (Ga. 1956). "Where there is conflict existing in the decisions of this court, the correct rule must be determined from the earliest decisions on the subject, and unless overruled, they are controlling." *Id.*; *Richmond County v. Sibert*, 125 S.E.2d 129, 131 (Ga. Ct. App. 1962). "The Court of Appeals is bound by the principles enunciated by the *oldest Supreme Court decision*, and not by the *latest* expression of the Supreme Court which does not overrule, modify, or distinguish its oldest case." *Id.*



conflicting districts.<sup>85</sup>

(4) If there are an odd number of such decisions the trial judge could follow the majority.

Under any of the approaches “[t]he law is unsettled”<sup>86</sup> so long as both vertical and horizontal stare decisis do not apply. The irony of vertical without horizontal stare decisis is that a trial court may be reversed for doing the “right” thing (following another district) or affirmed for doing the “wrong” thing (rejecting precedent from another district). This anomaly is less serious jurisprudentially than the balkanization problem. It is nonetheless troubling, and it does emphasize the logical relationship that ought to exist between vertical and horizontal stare decisis.

It is true that Floridians and other persons need to know that the same law will be applied in Pensacola, Tampa, and Miami, not only by trial courts but also by courts of appeal. Most litigants will not get the opportunity to have the Supreme Court of Florida directly apply any law to their case.<sup>87</sup> It is also true that potential litigants within Pensacola, Tampa, and Miami need to know that the same law will be applied whichever panel of the district court reviews a trial court decision. Furthermore, potential litigants need to know that the same law of Florida will be applied regardless of whether they wind up in state or federal court. Before examining the latter proposition, we shall consider the avoidance and resolution of intradistrict conflicts among panels within each of the district courts.

#### D. *Intradistrict Stare Decisis*

Since the 1980 amendment of the Florida Constitution, the supreme

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85. *Accord* State Farm Fire & Cas. Co. v. Yapejian, 605 N.E.2d 539, 542 (Ill. 1992). “This was not an instance in which the circuit court was faced with conflicting decisions from the various appellate districts and, in the absence of controlling authority from its home district, would have been free to choose between the decisions of the other appellate districts.” *Id.* (emphasis added). *But cf.* Garcia v. Hynes & Howes Real Estate, Inc., 331 N.E.2d 634, 636 (Ill. App. Ct. 1975). “To apply the principle of optional selectivity by a trial court in such situation could create an anomalous situation where the trial court one week would follow one principle and the following week, a contrary principle.” *Id.*

86. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1124 (Adkins, J., concurring).

87. *See supra* note 54.

court has no jurisdiction to review intradistrict conflicts.<sup>88</sup> An en banc process providing for the district courts to resolve conflicts within their respective districts is deemed an essential part of this appellate structural scheme.<sup>89</sup> Patterning after en banc rules of the United States Courts of Appeals for the Fifth and Eleventh Circuits,<sup>90</sup> the Supreme Court of Florida promulgated Florida Rule of Appellate Procedure 9.331, effective in 1980.<sup>91</sup> The rule authorizes each district court of appeal to sit en banc to resolve intradistrict conflicts of decisions when “necessary to maintain uniformity in the court’s decisions.”<sup>92</sup> In 1984, an additional provision for en banc review was made for cases “of exceptional importance.”<sup>93</sup>

From its inception, the operation of the en banc rule has been troubled.<sup>94</sup> In 1990, a district judge referred to it as “an old problem.”<sup>95</sup> In 1982, the Florida Conference of District Court of Appeal Judges petitioned the supreme court to consider an emergency rule change to address practical

88. *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, Florida Rules of Appellate Procedure, 416 So. 2d 1127, 1127 (Fla. 1982). Under article V, section 3(b)(3) of the Florida Constitution, the supreme court may review a district court decision that expressly and directly conflicts with a decision of *another* district court. Under section 3(b)(4), it may review a district court decision that is certified by it to be in direct conflict with a decision of *another* district court. FLA. CONST. art. V, § 3(b)(4).

89. *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, Florida Rules of Appellate Procedure, 416 So. 2d at 1130 (Commentary).

90. *Id.*

91. FLA. R. APP. P. 9.331(a). This rule was originally promulgated in *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, Florida Rules of Appellate Procedure, 374 So. 2d 992, 993 (Fla. 1979). Rule 9.331(a) has been amended several times, most recently by *In re Amendments to the Florida Rules of Appellate Procedure*, 609 So. 2d 516, 564-65 (Fla. 1992). Most of the amendments are stylistic. However, in 1984, provision for en banc review was made for cases “of exceptional importance” in addition to en banc review when necessary to maintain uniformity in the court’s decisions. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1115.

92. FLA. R. APP. P. 9.331(a).

93. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1119.

94. See generally Mattis, *Stare Decisis Florida*, *supra* note 23, at 163-72 (discussing the history of intradistrict conflicts through various changes in the Florida Constitution). In *State v. Bankowski*, the court “express[ed] [its] apologies” for “extreme delay in bringing [the] matter to final disposition.” 570 So. 2d 1152, 1153 (Fla. 4th Dist. Ct. App. 1990).

95. *State v. Georgoudiou*, 560 So. 2d 1241, 1248 (Fla. 5th Dist. Ct. App.) (Cowart, J., dissenting), *review denied*, 574 So. 2d 141 (Fla. 1990). Judge Cowart cited numerous opinions of district courts. *Id.* at 1248. He further referred to the “vague standard for selection of cases for en banc consideration coupled with no appellate review of the selection decision” which could “combine to deny the litigant equal protection of the law and deprive him of his constitutional right to have his case on appeal heard and decided by the three judge panel to which it was duly, and constitutionally, assigned for decision.” *Id.*

problems that had arisen in the en banc decisional process. The chief judges of the district courts asked whether one three-judge panel could overrule or recede from a prior decision of a three-judge panel of the same court. The supreme court responded that it would not by court rule prohibit overruling or receding by a three-judge panel, but it admonished the district judges to refrain from that action. Instead, when a three-judge panel is confronted with its district precedent with which it disagrees, it should suggest an en banc hearing.<sup>96</sup>

Generally, the district courts seem to have refrained from panel overruling, expressing a commitment to the proposition that a prior panel decision of their particular district court is binding authority absent en banc review.<sup>97</sup> When a majority of district judges in a particular district think it is necessary or desirable to recede from or overrule a prior decision, en banc review is usually utilized.<sup>98</sup> Despite the supreme court's admonition, however, conflicting panel decisions do occur.<sup>99</sup> Inconsistent rulings by

96. *In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, *Florida Rules of Appellate Procedure*, 416 So. 2d at 1128.

97. *E.g.*, *State v. Delasierra*, 614 So. 2d 564, 566 (Fla. 3d Dist. Ct. App. 1993) (concurring opinion expressing "grave doubts about the constitutional validity" of the substantive rule (search and seizure) applied, but stating that "our recent decision . . . is binding authority on this panel" and that Rule 9.331 "compels this result"); *State v. Clark*, 538 So. 2d 500 (Fla. 3d Dist. Ct. App. 1989) (Schwartz, C.J., specially concurring) (expressing continuing disagreement with a prior panel decision of which the court as a whole denied en banc review, but stating that its holding represents "the law of this district," which every subsequent panel is bound to follow under Rule 9.331); *Holding Electric, Inc. v. Roberts*, 512 So. 2d 1112 (Fla. 3d Dist. Ct. App. 1987) (stating "[i]n the absence of a decision by the court en banc to overrule *Mardan*, the present panel is bound by that decision"), *rev'd*, 530 So. 2d 301 (Fla. 1988); *State v. Johnson*, 516 So. 2d 1015, 1016 (Fla. 5th Dist. Ct. App. 1987) (stating "[b]ecause we are bound by the prior decision of this court . . . we must affirm").

98. *E.g.*, *State v. McKenzie*, 574 So. 2d 1176 (Fla. 5th Dist. Ct. App. 1991) (stating "[b]ecause we find it necessary to recede from the holding [in a prior Fifth District decision], we have considered this case *en banc*"); *Brown v. Champeau*, 537 So. 2d 1120 (Fla. 5th Dist. Ct. App. 1989); *Inscho v. State*, 521 So. 2d 164 (Fla. 5th Dist. Ct. App. 1988); *cf.* *Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1101 (Fla. 4th Dist. Ct. App. 1988) (noting case removed from en banc calendar since there was no conflict, no need to recede, and an absence of exceptional importance) (Glickstein, J., dissenting).

99. In *McBride v. State*, 604 So. 2d 1291, 1292 (Fla. 3d Dist. Ct. App. 1992), the Third District Court chose to follow a 1991 Fourth District decision (*Stayer*) and reject a 1992 Fourth District decision (*Scott*). The Third District commented: "There appears to be no authority for *Scott's* departure from the earlier panel decision in *Stayer* without the intervention of an en banc court." *Id.* at 1292 n.1.

In *Johnson v. State*, 568 So. 2d 519 (Fla. 1st Dist. Ct. App. 1990), a three judge panel

First District panels provided the supreme court with an opportunity to make it clear that later panel decisions overrule prior panel decisions.<sup>100</sup> In *State v. Walker*,<sup>101</sup> the supreme court accepted for review a 1991 Fourth District decision on the basis that it conflicted with a 1986 First District decision.<sup>102</sup> The supreme court then ascertained that a 1990 First District decision ruled opposite to a 1986 First District decision.<sup>103</sup> The court held that where there is an intradistrict conflict, a subsequent decision overrules a prior decision as the decisional law in the district.<sup>104</sup> The subsequent First District decision was consistent with the 1991 Fourth District decision.<sup>105</sup> Therefore, no direct conflict was presented to the supreme court as required by article V, section 3(b)(3), and the court dismissed the case since it was without jurisdiction.<sup>106</sup>

Another problem that has arisen under the en banc rule is a disagreement among district judges as to what constitutes intradistrict conflict sufficient to authorize an en banc hearing or rehearing. The wording of Rule 9.331(a) is hardly precise: "En banc hearings and rehearings shall not be ordered unless the case is of exceptional importance or unless *necessary to maintain uniformity in the court's decisions*."<sup>107</sup> Tests applied for what is "necessary to maintain uniformity in the court's decisions" vary widely

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of the First District ruled contrary to the earlier First District decision in *Watson v. State*, 504 So. 2d 1267, 1270 (Fla. 1st Dist. Ct. App. 1986), *review denied*, 506 So. 2d 1043 (Fla. 1987), on the issue of whether life felonies are subject to enhancement under the habitual offender statute. The later decision did not mention the former.

In *Ayares-Eisenberg Perrine Datsun, Inc. v. Sun Bank*, 455 So. 2d 525, 528 (Fla. 3d Dist. Ct. App. 1984), the Third District Court followed a 1980 Third District decision and did not follow a 1976 Third District decision, thus "find[ing] ourselves in conflict with another panel of this court . . . and with other district courts of appeal." The *Sun Bank* court did not purport to overrule the contrary 1976 decision. The United States Court of Appeals for the Eleventh Circuit then had to deal with the conflicts in attempting to apply the law of Florida in a diversity case. *Peoples Bank v. Roberts*, 779 F.2d 1544 (11th Cir. 1986).

100. See *Johnson*, 568 So. 2d at 519.

101. 593 So. 2d 1049 (Fla. 1992).

102. *Id.*

103. *Id.*

104. *Id.* at 1050. The court's citation of a 1968 supreme court case made it clear that the rule had survived, or had been reinstated by various constitutional changes. It cited *Little v. State*, 206 So. 2d 9, 10 (Fla. 1968), decided at a time when the supreme court had no jurisdiction to review intradistrict conflict, as is once again the case since 1980. See Mattis, *Stare Decisis Florida*, *supra* note 23, at 163, 166 n.144.

105. *Walker*, 593 So. 2d at 1049.

106. *Id.*

107. FLA. R. APP. P. 9.331(a) (emphasis added).

among districts, panels, and judges.<sup>108</sup> In 1985, the supreme court answered a question certified to it by the Third District Court: What is the proper scope of review for district courts of appeal in granting rehearings en banc?<sup>109</sup> The supreme court responded that district courts are free to develop their own concepts of decisional uniformity.<sup>110</sup> They are not limited by the standards adopted by the supreme court in the exercise of its discretionary conflict jurisdiction.<sup>111</sup> “[T]he district court of appeal, in implementing the provisions of appellate procedure rule 9.331, has authority to adopt the standard of conflict it believes necessary or appropriate in order to harmonize the decisions of the court and avoid costly relitigation of similar issues within its appellate district.”<sup>112</sup> Thus, standards in one district may properly be different from standards in another, without creating a conflict between district court decisions to activate supreme court conflict jurisdiction.<sup>113</sup>

Not surprisingly, disagreement and uneven application of standards persist among the district judges.<sup>114</sup> The district judges use a variety of tests, such as: (1) whether it would be difficult for the legal profession to harmonize the original panel decision under review with a prior decision of the same district;<sup>115</sup> (2) whether the decisions are so inconsistent and disharmonious that they would not have been rendered by the same panel

108. See Harvey J. Sepler, *En Banc Review in Florida Appellate Courts*, 62 FLA. B.J. 37, 38-39 nn.11-13 (1988) (citing a dozen cases representing all districts utilizing what Sepler analyzes as three parallel tests for decisional uniformity in the en banc context). Moreover, there is no clear agreement on a test for “exceptional importance.” *State v. Georgoudiou*, 560 So. 2d 1241, 1247 (Fla. 5th Dist. Ct. App. 1990) (en banc) (Coward, J., dissenting).

109. *Chase Fed. Sav. & Loan Ass’n v. Schreiber*, 479 So. 2d 90, 91 (Fla. 1985), *cert. denied*, 476 U.S. 1160 (1986).

110. *Id.*

111. *Id.*

112. *Id.* at 94.

113. See *Schreiber*, 479 So. 2d at 104-05 (Ehrlich, J., concurring in part, dissenting in part).

114. See Mattis, *Stare Decisis Florida*, *supra* note 23, at 172; *Georgoudiou*, 560 So. 2d at 1241; *Fleischer v. Hi-Rise Homes, Inc.*, 536 So. 2d 1101, 1102 (Fla. 4th Dist. Ct. App. 1988) (referring to “protracted debate, for which we [the court] must confess judicial dismay” in deciding to reconsider and not to render an en banc decision); *State v. Navarro*, 464 So. 2d 137, 140 (Fla. 3d Dist. Ct. App. 1985) (granting rehearing en banc on basis of “misapplication of a rule of law,” citing the supreme court’s decision in *Schreiber*, opinion filed July 26, 1984) (Ferguson, J., dissenting to rehearing en banc); see also Sepler, *supra* note 108, at 37-39.

115. *Schreiber*, 422 So. 2d at 912-13, *quashed on other grounds*, 479 So. 2d 90 (Fla. 1985). Judge Schwartz’s “practical” test was approved by the supreme court in quashing *Schreiber*, 479 So. 2d at 94-95.

of the court;<sup>116</sup> (3) whether there has been a misapplication of a well-established rule of law of the district;<sup>117</sup> (4) whether the appellate court directly recedes from its own previously announced rule of law; and, (5) whether the court applied the same rule in two cases having indistinguishable facts, but nevertheless reached two different conclusions.<sup>118</sup>

We are left, then, with different rules among district judges within a district, among panels, and among the five district courts of appeal regarding when en banc review is necessary to achieve uniformity of law within a district. Even more troubling, each district is free to create conflicts with other districts on substantive points of law and each district has done so freely and without qualm. The question then becomes, as long as we do not recognize horizontal stare decisis, do we have "the law of Florida" on any particular point or do we indeed have the laws of five balkanized districts? The answer depends only partially on how dependably and how expeditiously the supreme court resolves conflicts among the districts. The answer has an impact on even-handedness of treatment among Florida state litigants, the equality of treatment between state court and federal court litigants, and the constitutional underpinnings of *Erie*.

### III. THE *ERIE* OVERLAY: FEDERAL COURTS' TREATMENT OF STATE LAW

Our system of jurisprudence comprises a dual court system containing both state and federal courts. Often, a state court is required to apply federal law. Similarly, a federal court is often called upon to apply state law to a specific issue in a particular case.<sup>119</sup> However, if there is no statute or recent decision by the state's highest court, the federal court faces the problem of determining the content of the rule of state law that is to be applied.

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116. Also a "practical" test enunciated by Judge Schwartz in *Schreiber*, 422 So. 2d at 912 n.l.

117. *Navarro*, 464 So. 2d at 140. Judge Ferguson, in his dissenting opinion, labeled the standard freewheeling and elusive. *Id.* at 143.

118. Extensive case citation for all of these tests is provided in Sepler, *supra* note 108, at 37-39.

119. The problem arises in diversity cases as well as federal question cases whenever the federal law fails to supply a rule of decision, but refers to state law for an answer. *See, e.g., Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *see also supra* notes 3-8 and accompanying text.

A. *Early Erie*

In the 1938 case of *Erie Railroad Co. v. Tompkins*,<sup>120</sup> the Supreme Court of the United States handed down what has been characterized as one of the most important cases in American legal history.<sup>121</sup> In that case, Justice Brandeis indicated that when state law supplied the rule of decision, the federal court was to apply state law whether "declared by its Legislature in a statute or by its highest court."<sup>122</sup> In 1940, the Supreme Court handed down a series of decisions dealing with the problem of how to determine the content of state law when state law supplied the rule of decision on an issue.<sup>123</sup> The Court held that a federal court must follow the decision of a lower state court in the absence of any persuasive data that the highest court of the state would decide otherwise.<sup>124</sup>

The most troublesome of the 1940 cases was *Fidelity Union Trust Co. v. Field*,<sup>125</sup> which involved the decisions of a New Jersey trial court of statewide jurisdiction.<sup>126</sup> The New Jersey Legislature had passed a statute that clearly seemed to change prior law and permit a legal device known as a "totten trust."<sup>127</sup> However, in two separate cases that came before the New Jersey Court of Chancery,<sup>128</sup> two vice-chancellors held that the statute had not changed the law and that "totten trusts" were not permitted in spite of the statute.<sup>129</sup>

When a similar case came before a federal court in New Jersey, the Third Circuit recognized that under the command of *Erie*, it was required to apply state law with regard to the construction of state statutes.<sup>130</sup> The

120. 304 U.S. 64 (1938).

121. See CHARLES A. WRIGHT, *FEDERAL COURTS* 352-53 (4th ed. 1983). Professor Wright says: "It is impossible to overstate the importance of the *Erie* decision. It . . . goes to the heart of the relations between the federal government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government." *Id.* at 355.

122. *Erie*, 304 U.S. at 78 (1938).

123. WRIGHT, *supra* note 121, at 372.

124. *Id.* at 370-71.

125. 311 U.S. 169 (1940), *rev'g* 108 F.2d 521 (3d Cir. 1939).

126. *Id.*

127. WRIGHT, *supra* note 121, at 370. A "totten trust" allows parties to deposit funds in a bank and name themselves trustee for another, thereby creating a tentative trust revocable at any time before death. *Id.*

128. A *nisi prius* (or trial) court.

129. WRIGHT, *supra* note 121, at 371.

130. *Field v. Fidelity Union Trust Co.*, 108 F.2d 521, 526 (3d Cir. 1939), *rev'd on other grounds*, 311 U.S. 169 (1940).

question remained, however, whose interpretation of the statute the court should use. Reading the *Erie* reference to the “highest court” literally, two judges of the Third Circuit panel concluded that they were not bound to follow a New Jersey trial court’s interpretation of the statute.<sup>131</sup> They stated that “[w]here that law has been determined by the courts of last resort their decisions are stare decisis, and must be followed . . . . As to the pronouncements of other state courts, however, we are not so bound, but may conclude that the decision does not truly express the state law.”<sup>132</sup> The court refused to follow the decisions of the vice-chancellors, and awarded the proceeds of the trust to the beneficiary.<sup>133</sup>

The Supreme Court reversed and held that where the state law supplies the rule of decision, it is the duty of the federal courts “to ascertain and apply that law even though it has not been expounded by the highest court of the State.”<sup>134</sup> Subsequently, when the “totten trust” issue came before a New Jersey state court, the decision of the Third Circuit was followed, with the notation that it had been “reversed on other grounds” by the Supreme Court.<sup>135</sup> Thus, on the question of the content of New Jersey law, it turned out that the Third Circuit had been correct.

This was grist for the mill of legal scholarship, and leading scholars of the day criticized the Supreme Court’s *Field* doctrine from the academy<sup>136</sup> and the bench. In a brief but biting criticism, Judge Jerome N. Frank likened federal judges, faced with questions of state law, as being forced by the Supreme Court “to play the rule [sic, role] of ventriloquist’s dummy to the courts of some particular state.”<sup>137</sup> Years later, the late Judge Henry Friendly, one of the leading legal scholars of our century, referred to the Supreme Court’s 1940 series of decisions as “the excesses of 311 U.S. [of the United States Reports].”<sup>138</sup>

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131. *Id.* at 527

132. *Id.* at 526.

133. *Id.*

134. *Field*, 311 U.S. at 177.

135. *Hickey v. Kahl*, 19 A.2d 33 (1941).

136. See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290-95 (1946). Charles Clark, a former Dean of the Yale Law School, was United States Circuit Judge, Second Circuit Court of Appeals, when he wrote this article. *Id.*; see also Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954).

137. *Richardson v. Commissioner*, 126 F.2d 562, 567 (2d Cir. 1942).

138. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 400 (1964).



The zenith of the *Field* doctrine probably came in a Sixth Circuit case. The Sixth Circuit felt bound to follow an unreported decision of an intermediate Ohio court in the face of an Ohio statute providing that "only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state."<sup>139</sup>

### B. Reformed Erie

It seemed inevitable that the Supreme Court would have to back down from the furthest extremes of the *Field* doctrine. As Professor Wright has pointed out, to do otherwise would be to simply substitute one kind of forum shopping for another. He writes:

The lawyer whose case was dependent on an old or shaky state court decision that might no longer be followed within the state would have a strong incentive to maneuver the case into federal court, where, on the mechanical jurisprudence that the Erie doctrine was once thought to require [under *Field*], the state decision could not have been impeached.<sup>140</sup>

By 1967, the Second Circuit decided that it was no longer bound by the *Field* holding.<sup>141</sup> Despite the fact that *Field* had not been expressly overruled, subsequent Supreme Court decisions indicated that it had been modified.<sup>142</sup> In its strictest sense, *Field* was no longer the law.<sup>143</sup> Presently, the position expressed by the Second Circuit is well accepted among the federal appellate courts.<sup>144</sup>

However, since the *Field* case, the Supreme Court has given very few instructions to the bench and bar on solving the problem of how a federal court is to determine state law when the question has not been addressed by the highest state court. Moreover, except for expressing a general approval of the certification process, whereby federal courts can certify questions of

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139. *Gustin v. Sun Life Assur. Co.*, 154 F.2d 961 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946).

140. WRIGHT, *supra* note 121, at 374.

141. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). In *Roginsky*, the court stated: "[w]e do not consider ourselves as bound by the rulings of a state *nisi prius* judge although we treat these with respect." *Id.* at 851.

142. WRIGHT, *supra* note 121, at 372.

143. *Id.*

144. 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507 at 88-91 (1988) [hereinafter PRACTICE AND PROCEDURE].

state law to the highest state court,<sup>145</sup> the Court has never touched on the problem of conflicting decisions among state appellate courts.

The first retreat from the furthest extensions of the *Field* doctrine came in 1948.<sup>146</sup> In *King v. Order of United Commercial Travelers*,<sup>147</sup> the Court was faced with the contention that a federal court was bound by an unreported decision of a South Carolina Court of Common Pleas that would not have had precedential value in any other South Carolina court.<sup>148</sup> The Court indicated that such a case was entitled to "some weight."<sup>149</sup> However, the Court decided it was not controlling on the federal court.<sup>150</sup>

Less than a decade later, the Court gave further instructions on this issue. Where the highest state court had spoken, time or other events might cast doubt on whether the previous decision would still be followed. The issue in *Bernhardt v. Polygraphic Co. of America*<sup>151</sup> was whether a 1910 Vermont decision was binding on a federal court in 1956.<sup>152</sup> The Court held that it was, but at the same time instructed lower courts, in a round-about way, on how they should handle such a problem.<sup>153</sup> The Court stated: "[T]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of the Vermont judges on the question, no legislative development that promises to undermine the judicial rule."<sup>154</sup> The Court seemed to be asking the lower courts to draw the inference that if there had been any doubts, a federal court might have been free to disregard a holding by a state trial court, or even the 1910 decision by the state's highest court.

Further instruction on how to handle the problems of state law content was present in the 1967 federal tax case of *Commissioner v. Estate of Bosch*,<sup>155</sup> involving a situation where the federal court was required to

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145. *E.g.*, *Lehman Bros. v. Schein*, 416 U.S. 386 (1974); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960). Certification is discussed *infra* notes 241-42, 255-58 and accompanying text.

146. WRIGHT, *supra* note 121, at 372.

147. 333 U.S. 153 (1948).

148. WRIGHT, *supra* note 121, at 372.

149. *King*, 333 U.S. at 160.

150. *Id.* at 161.

151. 350 U.S. 198 (1956).

152. *Id.* at 202.

153. *Id.* at 204-05.

154. *Id.* at 205. The implications of *Bernhardt* are discussed in 19 PRACTICE AND PROCEDURE, *supra* note 144, at 87-91.

155. 387 U.S. 456 (1967).

apply state law in solving a federal tax question.<sup>156</sup> In *Bosch*, the Court cited *Erie* cases and said that “under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling.”<sup>157</sup>

The *Bosch* Court held:

[W]hen the application of a federal statute is involved, the decision of a state trial court . . . should *a fortiori* not be controlling . . . . This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State’s highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving “proper regard” to relevant rulings of other courts of the State. *In this respect, it may be said to be, in effect, sitting as a state court.*<sup>158</sup>

The court’s holding was a far cry from the implications of the 1940 *Field* decision. In fact, for the last several decades, federal courts have indicated that they are no longer absolutely bound by decisions of lower state courts.<sup>159</sup> Some federal courts have even felt free, under the updated version of *Erie*, to refuse to follow outdated decisions of the highest court of the state when applying the law of that state.<sup>160</sup>

Two of the dissenters in *Bosch* developed the formula now being applied “to determine state law in diversity cases—essentially, that, absent a recent judgment of the State’s highest court, state cases are only data from which the law must be derived—is necessarily applicable without modification in all situations in which federal courts must ascertain state law.”<sup>161</sup> Having stated what they thought to be the majority’s rule, Justices Harlan and Fortas, disagreed with it.<sup>162</sup> According to them, “[t]he relationship between the state and federal judicial systems is simply too delicate and important to be reduced to any single standard.”<sup>163</sup>

Perhaps the standard announced by Justices Harlan and Fortas, with

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156. *Id.* at 465.

157. *Id.*

158. *Id.* (emphasis added).

159. See 19 PRACTICE AND PROCEDURE, *supra* note 144, at 88-98.

160. *Mason v. American Emery Wheel Works*, 241 F.2d 906 (1st Cir. 1957) (refusing to be bound by an outdated holding of the Mississippi Supreme Court in light of recent statements by that court indicating that it might no longer follow the old rule).

161. *Estate of Bosch*, 387 U.S. at 477 (Harlan, J., and Fortas, J., dissenting).

162. *Id.*

163. *Id.*

regard to their understanding of how the formula should be applied, is itself a bit too simplistic. According to Professors Wright, Miller and Cooper, a "solid statement"<sup>164</sup> of the method to be applied by federal judges, faced with problems of interpreting state law, was the one announced by the Third Circuit Court of Appeals in *McKenna v. Ortho Pharmaceutical Corp.*<sup>165</sup> As stated by the court in *McKenna*:

An accurate forecast of [state] law, as it would be expressed by its highest court, requires an examination of all relevant sources of that state's law in order to isolate those factors that would inform its decision. The primary source that must be analyzed of course, is the decisional law of the [state supreme court]. In the absence of authority directly on point, decisions by that court in analogous cases provide useful indications of the court's probable disposition of a particular question of law. It is important to note, however, that our prediction "cannot be the product of a mere recitation of previously decided cases." In determining state law, a federal tribunal should be careful to avoid the "danger" of giving "a state court decision a more binding effect than would a court of that state under similar circumstances." Rather, relevant state precedents must be scrutinized with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends which they evince.

Considered dicta by the state's highest court may also provide a federal court with reliable indicia of how the state tribunal might rule on a particular question. Because the highest state court "enjoys some latitude of decision in ascertaining the law applicable to a particular dispute even where there may be dicta in point," however, a federal court should be circumspect in surrendering its own judgment concerning what the state law is on account of dicta. As Professor Charles Alan Wright has written, "much depends on the character of the dictum." Of somewhat less importance to a prognostication of what the highest state court will do are decisions of lower state courts and other federal courts. Such decisions should be accorded "proper regard" of course, but not conclusive effect. Thus, the Supreme Court has held that although the decision of a lower state court "should be 'attributed some weight . . . the decision (is) not controlling . . . ' where the highest court of the State has not spoken on the point . . . . Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling." Additionally, federal courts may consider scholarly treatises, the Restatement of Law, and germane law review

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164. 19 PRACTICE AND PROCEDURE, *supra* note 144, at 89 n.30.

165. 622 F.2d 657 (3d Cir. 1980).

articles—particularly, it seems, of schools within the state whose law is to be predicted.<sup>166</sup>

Note, however, that even with this elaborate statement, nothing is said about the problem of conflicting state intermediate appellate court decisions.

### C. *Erie* Instructions—Few and Far Between

There have only been three instances since 1940 where the Supreme Court of the United States has addressed the problem of how a federal court is to determine the content of state law when state law provides the rule of decision.<sup>167</sup> *King*, *Bernhardt*, and *Bosch* are the only guidelines handed down by the Court since *Field*. The most recent of those three cases is now more than a quarter century old.

At the time *Erie* was decided, only twelve of the then forty-eight states had intermediate appellate courts.<sup>168</sup> Moreover, the entire *corpus juris* of the country was far less complex than it is today. Presently, there has yet to be a Supreme Court decision instructing the lower federal courts on how to handle the problems of conflicting state intermediate appellate court decisions.

Although it is true that there have been Supreme Court cases emphasizing the “twin aims of the *Erie* doctrine—‘discouragement of forum-shopping and avoidance of inequitable administration of the [laws],’”<sup>169</sup> these cases, had nothing to do with the problem of ascertainment of state law. It seems obvious that if the twin aims of the *Erie* doctrine are discouragement of forum shopping and avoidance of inequitable administration of the law,<sup>170</sup> then the problem of conflicting state appellate court decisions is a problem that should be addressed. As long as the law administered in the federal courthouse is different from the law administered in the state courthouse down the street, there will be forum shopping, and it will therefore be

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166. *Id.* at 662-63 (footnotes omitted).

167. *King v. Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948); *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198 (1956); *Estate of Bosch*, 387 U.S. at 456.

168. This number came from a count of the courts listed in the front of the West National Reporter system in 1938. Of these 12, some had only limited jurisdiction, such as the Oklahoma Criminal Court of Appeals.

169. *Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), on the twin aims of *Erie*).

170. Aren't these “twin aims” really one and the same?

impossible to avoid inequitable administration of the law.<sup>171</sup>

If the highest court of the state whose substantive law is applicable has addressed the issue in a fairly recent case, the problem of what law federal courts should apply is almost nonexistent. The federal court simply applies the law as enunciated by the highest state court.<sup>172</sup> If the highest court has spoken to the issue, but time or developments in other jurisdictions have created a doubt as to whether the previous decision would be followed today, the Supreme Court has given instructions on how a federal court is to handle the problem.<sup>173</sup>

A more serious problem of applying state law occurs when there is no decision by the highest court of the state, but there are decisions by lower courts at either the trial or appellate level. This issue is complicated by the Supreme Court's modification of its original position without expressly overruling *Field*. However, as discussed above, it now seems clear that a federal court is no longer absolutely bound by a decision of a lower state court at either the trial or appellate level.<sup>174</sup> The only requirement is that federal courts give them "proper regard."<sup>175</sup> Beyond this rather meager guidance, however, very little is clear.

Perhaps the thorniest problem for the federal trial judge in this area is the situation that exists when there are conflicting decisions among state intermediate appellate courts. Most federal courts will handle this problem by deciding the issue the way they think the highest court in the state would decide it. Those who follow this policy seem to perceive it as the policy of the Supreme Court as well. However, this method may well encourage forum shopping.

Since several states that have distinct and different systems of appellate courts, it seems improbable that the twin aims of *Erie* can be met if all state court systems are treated the same way by federal courts deciding issues of state law. Recall the statement of Justices Harlan and Fortas, dissenting in *Bosch*: "The relationship between the state and federal judicial system is simply too delicate and important to be reduced to any single standard."<sup>176</sup>

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171. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Id.*

172. *Estate of Bosch*, 387 U.S. at 465.

173. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956).

174. *Estate of Bosch*, 387 U.S. at 457.

175. *Id.* at 465.

176. *Id.* at 477.

### D. *The Klaxon Overlay*

After Harry Tompkins was struck by an object protruding from a train while walking in Pennsylvania on a right-of-way belonging to the Erie Railroad, he brought suit against the railroad in New York.<sup>177</sup> The Supreme Court held that the standard of duty owed by the railroad to Tompkins was determined by state law rather than general federal common law.<sup>178</sup> It was unclear which state's law the court should use in making its decision: New York's, where the trial was held, or Pennsylvania's, where the accident occurred. Everyone who read the opinion must have known that the Court was referring to the law of Pennsylvania, but the Court was not explicit about the method of choosing the rule of state law in a conflict of laws situation. The oversight was corrected three years later, in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>179</sup> when the Court set down the rule that:

The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. . . . And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.<sup>180</sup>

In other words, a federal court, sitting in a particular state, should give the same deference to that state's choice of law (or conflict of law) rules as it would be required to give to the state's substantive law rules.<sup>181</sup> Thus, a New York federal judge, faced with a conflicts problem from an accident that occurred in California, is to apply the same law that the New York Court of Appeals would apply in solving the problem. If it is more likely that the New York Court of Appeals would apply California substantive law, then so must the federal judge sitting in New York. This situation led Judge Friendly to posit:

Our principal task, in this diversity of citizenship case, is to deter-

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177. For a fascinating account of the story of the litigation in *Erie*, see Irving Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011 (1978).

178. *Erie*, 304 U.S. at 78.

179. 313 U.S. 487 (1941).

180. *Id.* at 496. This rule was reaffirmed by the Court in *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).

181. *Klaxon*, 313 U.S. at 496.

mine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But life, here coupled with death, casts up new problems, and the court seised of the case is obliged, as best it can, itself to blaze the trail of the foreign law that it has been directed to follow.<sup>182</sup>

Facetious as this statement was, there is little doubt that it is as accurate today as when it was first written.

Given that federal courts are under the command of *Erie*—with its twin goals, preventing forum shopping and inequitable administration of the law—and given the *Klaxon* overlay, should federal courts faced with a state law problem simply decide the case the way they think the state's highest court would decide it; or should they try to foster the twin goals of *Erie* and decide the issue according to the decisions that would be binding on a state trial judge?

#### E. *A Changed Situation With State Intermediate Courts*

As mentioned above, when *Erie* was decided only twelve states had intermediate appellate courts.<sup>183</sup> Today, there are thirty-seven states with intermediate appellate courts.<sup>184</sup> Many of these have been created in the past twenty years.<sup>185</sup> It seems safe to say that today, most of the new "law" that binds state trial courts is handed down by state intermediate appellate courts, rather than by the highest courts of the several states. And yet, judges and legal scholars have paid little attention to the problems raised by the question of which courts are "bound" by intermediate appellate court decisions. This is true at both the state and the federal level.

Even in those states where it is agreed that an intermediate appellate court decision is binding on *all* state trial courts, there has yet to be much discussion about the problems raised by conflicting decisions among the intermediate appellate courts. There can be conflicting decisions between districts (interdistrict conflict); as well as conflicting decisions within the same appellate district (intradistrict conflict).

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182. *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960).

183. ROBERT L. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* 6 (2d ed. 1988).

184. *Id.*

185. *Id.* At the time Mr. Stern wrote this book, there were 38 states with intermediate appellate courts because North Dakota had created a "temporary court of appeals" for the period from July 1, 1987, through January 1, 1990. *Id.* at 7 n.14.



As discussed above,<sup>186</sup> until the Supreme Court of Florida rejected the rule, some appellate districts in Florida were holding that the courts below them were not bound by a decision of Florida appellate courts in other districts. In many states with intermediate appellate courts, the highest court has never spoken on the question. One appellate court may say that any appellate decision is binding on all trial courts in the state, but if another appellate court in the same state lays down a different rule, who is to say what the law of the state is on that point? When there is a conflict between the First and Fifth Districts, what are the trial judges in the Second, Third, and Fourth Districts supposed to do?<sup>187</sup> Few authoritative answers exist.

As we have seen in the Florida cases, courts even disagree on the question of whether there is a conflict between appellate decisions.<sup>188</sup> Just as one person's freedom fighter may be another person's terrorist, one judge's conflict may seem like perfect harmony to another judge.

In his classic book, Professor Levi described legal reasoning, or *stare decisis*, as

a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between the cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case

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.... *The determination of similarity or difference is the function of each judge.* Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important.<sup>189</sup>

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186. See *supra* notes 37-81 and accompanying text.

187. Some of the possibilities are discussed *supra* notes 83-86 and accompanying text.

188. See *supra* notes 108-18 and accompanying text.

189. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949) (emphasis added). Professor Levi later became Dean of the University of Chicago Law School and Attorney General of the United States.

Of course not everyone will agree with Professor Levi. He cites Professor Goodhart as presenting a different view. See Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161 (1930); see also BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); JEROME FRANK, COURTS ON TRIAL (1969); KARL LLEWELYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); E. PATTERSON, JURISPRUDENCE (1953).

Under such a system, it is only natural that there may be disagreement among lawyers and judges as to *when* a conflict between appellate decisions exists. Certainly, most would agree that there will indeed be conflicts. That being the case, it would seem that there should be rules, binding on all courts within a system, instructing them on what to do in case a conflict between decisions of appellate courts on the same level arises.

Several states have rules of precedent where it is agreed that an intermediate appellate court is not bound by the decision of a sister court.<sup>190</sup> Other jurisdictions, however, have rules that require an intermediate appellate court either to adhere to previous decisions by a court or panel on the same level, or to follow a special procedure for overruling the case.<sup>191</sup> It seems probable that in several states the problem has never been addressed by either the appellate courts or the highest state court.

With all of these different court systems and rules of appellate precedent existing among the states, federal courts have had very little guidance from the Supreme Court on how the problem of lower court precedent should be handled. What has been created in many states is a forum shopper's supermarket. Because of the prevailing rules of precedent binding on federal trial courts in Florida,<sup>192</sup> there will be frequent situations where a litigant, by filing in or removing to a federal court, will get a different result on an issue of state law from that which would have resulted had he filed in the state court down the street.

#### F. *Judicial Debate in Chicago*

The question of how a federal court should handle the problem of ascertaining the content of state law, when there are conflicting decisions among panels of the state's intermediate appellate courts, sparked a remarkable debate by judicial opinion between two judges of the United

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190. See, e.g., Taylor Mattis & Kenneth Yalowitz, *Stare Decisis Among [sic] the Appellate Court of Illinois*, 28 DEPAUL L. REV. 571, 583-592 (1979) (discussing the Illinois rule); *McGlothlen v. Department of Motor Vehicles*, 140 Cal. Rptr. 168 (1977).

191. See Taylor Mattis, *Stare Decisis Within Michigan's Court of Appeals: Precedential Effect of Its Decisions on the Court Itself and on Michigan Trial Courts*, 37 WAYNE L. REV. 265 (1991) [hereinafter Mattis, *Stare Decisis Michigan*] (discussing the Michigan Administrative Order 1990-6). Among the federal courts of appeal, the Fifth and Eleventh Circuits have rules under which a prior decision of the circuit (panel or en banc) cannot be overruled by a panel, but only by the court sitting en banc. See *Atlantis Dev. Corp., Ltd. v. United States*, 379 F.2d 818, 828 (5th Cir. 1967); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

192. See *infra* notes 232-51 and accompanying text.

States District Court for the Northern District of Illinois.<sup>193</sup> This debate merits extensive consideration in light of participants' intuitive insights into the general problem of *Erie* and state intermediate court decisions. It also merits detailed examination for its application to Florida as well as Illinois. The debate stage was set by a question of substantive state law: whether an insured may, under Illinois common law, maintain a claim against an insurer for its bad faith conduct in handling a first party claim under an insurance policy, and if so, whether punitive damages are available.

Like the five district courts of appeal in Florida, Illinois also has five district courts of appeal, although the latter system is unitary.<sup>194</sup> A panel

193. The *Erie* doctrine presents such complex legal problems that when we see judges examining it, we cannot help but think of the tale of the five blind men and the elephant. Each blind man was asked to feel part of the elephant, and was then asked to describe it. Each of the blind men touched the elephant and described it variously as a tree trunk, a serpent, a hose, a fan, and a wall.

If a judge sees the *Erie* case as a constitutional command, then the judge may act differently from the judge who sees it as merely a prudential judicial policy. Professor Wright points out that the early commentators had a great deal to say about the constitutional discussion in *Erie*, most of it critical. However, in recent years there has been substantial scholarly support for the constitutional aspect of the case. WRIGHT, *supra* note 121, at 363. Articles, pro and con, by many very distinguished scholars are listed. *Id.* nn. 14-16; *see also* John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) [hereinafter Ely, *Myth of Erie*].

We like to tempt our federal court students into further understanding by reading to them Professor Abram Chayes' comment about Professor Ely's article:

Professor Ely's full dress encounter with *Erie* is in every way the work of an adept. With his overall analytic framework I have no quarrel. On the contrary, I think his approach clarifies much that has mystified several decades of civil procedure students—which probably means that their professors have been mystified as well.

Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 741 (1974); *see also* John H. Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974).

Professor Ely suggests that *Erie* is not "a monolithic doctrine," but rather "three distinct and rather ordinary problems of statutory and constitutional interpretation." Ely, *Myth of Erie*, *supra* at 698. He contends that the Supreme Court practice of allowing federal courts to substitute general federal common law for state common law, as was done for almost a century under *Swift v. Tyson*, 41 U.S. 1 (1842), "was unconstitutional because nothing in the Constitution provided the central government with a general lawmaking authority of the sort the Court had been exercising under *Swift*." *Id.* at 703.

194. *See infra* note 289. The population of Illinois is roughly the same as that of Florida but is distributed much less evenly than Florida's. The Chicago/Cook County area has by far the heaviest concentration of people. Of the five appellate districts, the one encompassing Cook County has the most judges, and consequently the best chance for an

of the Fifth District Appellate Court of Illinois had held that there was a common law cause of action in tort for an insurer's bad faith refusal to make payments under a first party policy, adding that punitive damages were available under proper circumstances.<sup>195</sup> The First and Third Districts had held that a common law claim would not be allowed because it had been preempted by a statute.<sup>196</sup> The Fourth District has held that an earlier version of the statute had not preempted the field, and declined to express an opinion as to the newer version of the statute.<sup>197</sup> The Second District has held that the statute bars a common law claim for punitive damages, but leaves open the possibility of a common law recovery in tort for compensatory damages.<sup>198</sup> Thus, within a fairly short time span, Illinois district courts of appeal have taken several distinct approaches regarding the interpretation of the same state statute. Review had been sought and denied by the Supreme Court of Illinois in most of these cases.

This same substantive law problem was brought before Milton I. Shadur and Prentice H. Marshall, judges for the United States District Court for the Northern District of Illinois.<sup>199</sup> These two judges followed different approaches in determining the process to be used by a federal judge in determining the content of state substantive law to be applied.

Judge Shadur had held, in previous cases involving other points of law, that *Erie* requires a federal court to decide issues of substantive law in the

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intradistrict conflict.

195. *Ledingham v. Blue Cross Plan for Hosp. Care of Hosp. Serv. Corp.*, 330 N.E.2d 540 (Ill. App. Ct. 1975), *rev'd on other grounds*, 356 N.E.2d 75 (Ill. 1976). There was no indication that the court considered the effect of the statute on the plaintiff's right to assert a common law claim. Subsequent to this decision, the statute was amended.

196. *See* ILL. REV. STAT. ch. 73, § 767 (1983); *see also* *Tobolt v. Allstate Ins. Co.*, 393 N.E.2d 1171, 1180 (Ill. App. Ct. 1979); *Debolt v. Mutual of Omaha*, 371 N.E.2d 373, 376-77 (Ill. App. Ct. 1978). *Tobolt* appears to have been based on the pre-1977 version of the statute, but the court indicated that the present version of the statute supported its conclusion as well. *Tobolt*, 393 N.E.2d at 1180.

197. *Lynch v. Mid-America Fire & Marine Ins. Co.*, 418 N.E.2d 421, 425 (Ill. App. Ct. 1981). The Fourth District has held that the statute was not applicable when the insurer is a nonprofit health care service corporation. *McCall v. Health Care Serv. Corp.*, 452 N.E.2d 893, 896 (Ill. App. Ct. 1983).

198. *Hoffman v. Allstate Ins. Co.*, 407 N.E.2d 156, 158-59 (Ill. App. Ct. 1980).

199. The substantive issue was brought before several of the judges of the United States District Courts in Illinois. For the most part, we will confine our discussion to the way the problem was handled by two of them.

same way as a state trial judge would sitting in the same location.<sup>200</sup> Because he was sitting in Cook County, Illinois, Judge Shadur believed he should decide substantive law questions as if he were sitting as the Circuit Court of Cook County (the state trial court). As such, he would be required by Illinois law to follow the decisions of the First District of the Illinois Appellate Court.

Judge Marshall took the position that he was required to decide any issue of Illinois law the way he believed it would be decided by the Illinois Supreme Court.<sup>201</sup> On the issue before him, he did not think the Illinois Supreme Court would follow the decision of the First District.<sup>202</sup>

### 1. The Marshall Position—Supreme Court Swami<sup>203</sup>

Judge Marshall, when faced with the complex problem of conflicting intermediate appellate court decisions, resorts to what he labels the "Supreme Court predictive approach."<sup>204</sup> He admits that this approach does not have the advantage of being a bright line rule, and that judges will inevitably be "gazing into a crystal ball"<sup>205</sup> on some occasions. He states:

The proposition that we must act as state trial judges stems from a misapprehension of the commands of *Erie* and its progeny. *Erie* requires a federal court to apply the substantive law of the forum state;

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200. See, e.g., *Slate Printing Co. v. Metro Envelope Co.*, 532 F. Supp. 431, 434 (N.D. Ill. 1982) (Shadur, J.); *National Can Corp. v. Whittaker Corp.*, 505 F. Supp. 147, 148-9 n.2 (N.D. Ill. 1981) (Shadur, J.).

201. *Roberts v. Western-Southern Life Ins. Co.*, 568 F. Supp. 536, 539-40 (N.D. Ill. 1983); *Kelly v. Stratton*, 552 F. Supp. 641, 645 (N.D. Ill. 1982).

202. *Roberts*, 568 F. Supp. at 554-55. We need not be concerned here as to the reasons why Judge Marshall believed that the First District was wrong on the issue. Suffice it to say that he believed he had sufficient grounds to believe that the Illinois Supreme Court would use a different method in solving the problem of statutory interpretation that was before the court.

Ironically, another judge in the same district agreed with Judge Marshall on the method to be followed, (deciding the way he thought the Illinois Supreme Court would decide). However, that judge agreed with Judge Shadur on the merits of the issue, i.e. reached the same result as the First District.

203. Judge Marshall's opinions are long and quite detailed. He cites many primary and secondary authorities to support his position. It is impractical to reproduce those opinions in full here. At the same time there is a danger that the authors, by paraphrasing, may have missed important points made by the judge. For those who are interested in further detail, we suggest an examination of the original opinions discussed here.

204. *Roberts*, 568 F. Supp. at 543.

205. *Id.* at 545.

we take this to mean that we must apply the law that *ultimately* would be applied were the case to be litigated in the state courts. While intermediate appellate decisions exert upon us a high degree of persuasive force, and while they may be binding upon state trial courts, the law we must apply is that which the state supreme court would apply. In a given case we may choose to follow an intermediate appellate ruling, but we may not end our analysis of state law with mere citation to such rulings where we are persuaded that the state supreme court would rule otherwise.<sup>206</sup>

Judge Marshall believes that it is necessary to apply the law that the state supreme court would apply to avoid creating an incentive for forum shopping. The “state trial court” approach, he believes, invites forum shopping because it requires the federal courts to give *more* weight to state intermediate appellate decisions than would be given in the state system. Three examples are offered.<sup>207</sup>

In a case in which no supreme court decision exists and the appellate district [court] of proper state venue has not yet taken a position on an issue . . . , [Judge Shadur] would require a federal court to follow the law as declared by the other appellate districts . . . . However, the very fact that the various Illinois appellate districts sometimes conflict on an issue of law indicates the problem inherent in the state trial court approach. The appellate districts, it appears, do not consider each others’ decisions binding; rather, they regard them as persuasive authority only. Thus, if a litigant filed suit in a state court in the First District and the only intermediate appellate decision on a pertinent issue was from the Fourth District, while the trial court presumably would follow the Fourth District ruling, on appeal the First District would not necessarily do so, if it found persuasive reasons to do otherwise. In such a case, if diversity of citizenship existed, the litigant favored by the Fourth District rule could file the case in federal court (or remove it, if there was diversity of citizenship, in the case of a non-Illinois defendant) and thereby obtain ‘insurance’ that the favorable rule of law would be applied and upheld on appeal, were . . . [Judge Shadur’s holding] to apply.<sup>208</sup>

As a second example, Judge Marshall points out that even where “First District law” exists, the First District has five divisions which do not

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206. *Id.* at 539-40 (citations omitted) (emphasis added).

207. *Id.* at 540.

208. *Id.* at 540-41 (citations omitted).

consider themselves bound by the holdings of other divisions. Thus, Judge Shadur's rule "permits a diversity litigant in whose favor the non-unanimous but not as yet uncontradicted rule runs to obtain 'insurance' by bringing the case in federal court or removing it there."<sup>209</sup>

The third type of forum shopping Judge Shadur's rule was said to permit is somewhat more subtle. His rule requires federal courts to give more weight to state appellate decisions than the rendering courts themselves would give them. According to Judge Marshall, the "state law" that *Erie* requires him to follow includes the power to re-examine earlier holdings based upon "data" not considered in the earlier decision. *Erie*, he believes, permits a federal court to exercise the same authority.<sup>210</sup>

Judge Marshall then quotes Wright, Miller, and Cooper for the proposition that Judge Shadur's rule would result in merely substituting one kind of forum shopping for another. The lawyer depending on old or shaky precedent would bring his case into federal court secure in the knowledge that the federal court would follow the old state rule.<sup>211</sup> According to Judge Marshall, Judge Shadur's rule permits forum shopping because a federal court is required to give state intermediate precedent more weight than it would carry in other state appellate courts and "even in the rendering panel itself."<sup>212</sup>

Besides encouraging forum shopping, Judge Shadur's rule was said to be wasteful of both the litigants' and the courts' resources. Where a state appellate court has ignored a critically important "datum" of state law (as Marshall thought the state intermediate appellate courts had done in some of the precedents being urged on him when he heard *Kelly v. Stratton*<sup>213</sup>), it has caused the state court to reach a result that was incorrect as a matter of state law. The Shadur rule, according to Marshall, would require him to follow the appellate court ruling and reach a similarly erroneous result, despite the existence of persuasive reasons for believing that the state supreme court would not so hold. The result would require the district court to commit error and leave it to the court of appeals (which would then act

209. *Roberts*, 568 F. Supp. at 541.

210. *Id.* Ironically, for similar reasons Judge Shadur did not feel bound by his own court of appeals or "even one or two bits of language in United States Supreme Court opinions supporting that predictive approach," because the United States Supreme Court had not considered certain data in making those early decisions. See *Rizzo v. Means Serv., Inc.*, 632 F. Supp. 1115, 1131 (N.D. Ill. 1986); see *infra* notes 226-27 and accompanying text.

211. *Roberts*, 568 F. Supp. at 541-42 (citing 19 PRACTICE AND PROCEDURE, *supra* note 144, at 89-91).

212. *Id.* at 542.

213. 552 F. Supp. 641, 646-48 (N.D. Ill. 1982).

as the state appellate court) to correct the error. So read, Judge Shadur's rule was said to elevate form over substance and promote the needless expenditure of courts' and litigants' resources.<sup>214</sup>

[T]he central principle is that we must give appellate court holdings their due where the supreme court has not spoken, but we must not give them more than their due. This will require resort to the 'Supreme Court predictive approach,' but to do otherwise would be to ignore the policy of *Erie* and its progeny. That policy is the avoidance of forum shopping. When we apply the law that ultimately would be applied were the case litigated in state court, we are fully faithful to *Erie*. By contrast, to act as a state trial court, following intermediate appellate decisions that are erroneous as a matter of state law, not only would violate the policy of *Erie*, but would also elevate form over substance, as the court of appeals, assuming the role of its state counterpart, would apply the correct rule of state law. *Erie* requires us, in all cases, to apply the rule of law that the state supreme court would follow.<sup>215</sup>

## 2. The Shadur Rule—Just Another State Trial Court<sup>216</sup>

Judge Shadur's view is that a federal judge faced with a problem of state law should decide the case the same way as his state court counterpart would in the courthouse down the street. Since the state judge would be bound by an opinion of an appellate court whose geographical territory included the city where the state and federal courts sat, so should the federal judge.

Why is this the duty of the federal trial judge under the *Erie* doctrine? According to Judge Shadur, the answer is found in the *Erie* opinion, buttressed by the opinions in *Guaranty Trust Co. v. York*<sup>217</sup> and *Klaxon v. Stentor Electric Manufacturing Co.*<sup>218</sup> Judge Shadur writes:

Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citi-

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214. *Roberts*, 568 F. Supp. at 542-43.

215. *Id.* at 543 (footnote omitted).

216. Judge Shadur's views are set forth in a series of opinions. One can get the essence of his views from his opinions in *Rizzo v. Means Servs., Inc.*, 632 F. Supp. 1115 (N.D. Ill. 1986); *Abbott Laboratories v. Granite State Ins. Co.*, 573 F. Supp. 193 (N.D. Ill. 1983); and *Commercial Discount Corp. v. King*, 552 F. Supp. 841 (N.D. Ill. 1982).

217. 326 U.S. 99 (1945).

218. 313 U.S. 487 (1941).



zens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.<sup>219</sup>

Shadur cites *Guaranty Trust* as being in accord:

The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.<sup>220</sup>

Judge Shadur also points out that the *Klaxon* case treated state "choice-of-law rule as substantive, not procedural, for *Erie* purposes."<sup>221</sup> *Klaxon*, he said, required this because "[o]therwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."<sup>222</sup> Thus, Judge Shadur reads *Klaxon* as commanding him to treat "internal" state choice of law rules the same as *Klaxon's* treatment of external state choice of law rules. This leads Judge Shadur to a position fundamentally different from Judge Marshall.<sup>223</sup>

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219. *Abbott*, 573 F. Supp. at 197 (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938)).

220. *Id.* (quoting *Guaranty Trust*, 326 U.S. at 109).

221. *Id.* at 197 (quoting *Klaxon*, 313 U.S. at 496).

222. *Id.* (quoting *Klaxon*, 313 U.S. at 496).

223. Professor Geri Yonover disagrees and contends that "not even the broadest reading of *Klaxon* suggests that it embraces the stare decisis effect of [internal choice of law decisions] on federal—as opposed to state—courts." She says that the Illinois internal choice of law cases addressed their comments to state, not federal courts, and points out that in 1941, when *Klaxon* was decided, the prevailing choice of law rules used by state courts reflected those found in the now discredited first RESTATEMENT OF CONFLICT OF LAWS. Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 34-35 (1989).

While it is true that the Illinois internal choice of law cases were addressed to state courts, so are state external choice of law cases addressed by superior state courts to inferior state courts. Moreover, although *Klaxon* was decided in the era of the first RESTATEMENT, its principles were forcefully reaffirmed well into the era of the RESTATEMENT (SECOND), when the Fifth Circuit was reversed after being tempted to make some modern innovations

As in Florida, the Illinois internal choice of law rule of stare decisis requires that all trial courts in the state be bound by the decision of the appellate court of any district and by their own district court if there is a conflict.<sup>224</sup> Also, as in Florida, the Illinois district courts do not consider themselves bound by the decisions of other districts.<sup>225</sup>

Judge Marshall feels bound by the rule of *Bosch* and the Seventh Circuit to apply the state supreme court predictive approach when confronted with a litigant's claim that he is bound by an intermediate appellate court decision.<sup>226</sup> On the other hand, Judge Shadur considers himself free of some of the binding effects of those cases because the courts that rendered them did not take into consideration the internal choice of law rules that are binding on Illinois state courts.

Judge Shadur answered the criticism of his method, in part, as follows:

This Court is of course aware of the opinions of some of its colleagues who prefer the greater flexibility of trying to predict what the Illinois Supreme Court would do if and when faced with the same kind of conflict among Appellate Districts. And there are of course some statements in opinions by our Court of Appeals (and even one or two bits of language in United States Supreme Court opinions) supporting that predictive approach. But *not one* of those statements has dealt in terms with the situation (which may or may not be unique to Illinois) where an integral part of Illinois substantive law—which we federal judges are duty-bound to adhere to and follow under *Erie*—is a rule that mandates every Illinois trial court to follow current opinions in its own Appellate District, even if it might prefer the differing views of another Appellate District (or even if it believed the Illinois Supreme Court,

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on Texas' choice of law rules. See *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975).

It is hard to see how Judge Shadur can be faulted, therefore, for extrapolating from *Klaxon* the general principle that federal courts, applying state law, are required to follow state choice of law rules, whether internal or external.

224. *State Farm Fire & Casualty Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992). At the time Judge Shadur wrote his opinions, this rule had been adopted by some of the state districts, but had not been approved by the Illinois Supreme Court. Since then, the Illinois Supreme Court has cited those intermediate appellate opinions with apparent approval. *Id.* (citing *People v. Thorpe*, 367 N.E.2d 960 (Ill. App. Ct. 1977); *Garcia v. Hynes & Howes Real Estate, Inc.*, 331 N.E.2d 634 (Ill. App. Ct. 1975)). These were the very same cases relied upon by Judge Shadur in formulating his rule of intrastate choice of law rules.

225. See Mattis & Yalowitz, *supra* note 190, at 588-95, and cases cited therein.

226. *Roberts*, 568 F. Supp. at 540 (citing *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *In re Air Crash Disaster*, 701 F.2d 1189, 1196-98 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 866 (1983)).

given the opportunity, might opt for the other District's view) . . . .

Ordinarily the job of a state trial court, in the absence of controlling state supreme court precedent, is to make its best effort to decide what its supreme court would do if faced with the same problem. That task really accounts for the opinions that express a federal court's responsibilities in the same terms where state law is to provide the rule of decision. And that is so because of *Erie* itself and the very reason *why* it mandated federal courts' adherence to state substantive law . . . . But the same principle that informs *Erie* and its progeny compels a wholly different approach where the duty of the state trial court is not Supreme-Court-prediction but Appellate-Court-adherence. After all, . . . [internal choice of law cases] express at least as binding a substantive law principle in *Erie* terms as the substantive doctrines of contract or tort law we federal judges may be asked to choose between where the intermediate state courts differ. And, not so incidentally, the . . . [internal choice of law] rule is one as to which there is *no* split of Illinois authority and there is *no* reason to believe that the Illinois Supreme Court disagrees with the rule—indeed at least as recently as 1981 that court deliberately passed up the opportunity to announce a different rule . . . .

[S]o long as *Erie* binds us, we are not free to pick and choose which established state law doctrines we want to follow and which we do not — to ignore the unequivocal [state] choice-of-law mandate in favor of giving ourselves greater latitude in essaying to predict future Illinois Supreme Court decisions where Illinois Appellate Districts differ on rules of law. That latter approach fosters forum shopping in precisely the way *Erie* sought to eliminate: by creating the prospect of differing results for the diversity plaintiff who has a choice between filing suit in one of two Clerk of Court's Offices four blocks apart on Chicago's Dearborn Street, or for the diversity defendant who must decide whether or not to remove a case from the northernmost of those courts to the southernmost.<sup>227</sup>

### 3. Another Thrust by Marshall

In one opinion Judge Marshall had criticized Judge Shadur's position for, among other things, failing to take into account the lack of coincidence of the geographical territory of the federal districts in Illinois and the geographic territory of the state appellate districts. Judge Marshall pointed out that the Eastern Division of the Northern District of Illinois comprises not only Cook County but also several other counties, all of which lie in

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227. *Rizzo*, 632 F. Supp. at 1131-32. This last "prediction" of Judge Shadur turned out to be true. See *Yapejian*, 605 N.E.2d at 539.

districts other than the First District. Moreover, in cases where all defendants are non-residents, Illinois law permits the plaintiff to bring suit in any county. Marshall writes:

Thus, . . . [Judge Shadur's] approach is inconsistent with *Erie* in that it might require a federal court to apply a rule of decision that would not be used if plaintiff filed in state court. In fact, . . . [Judge Shadur's rule] would enable a defendant to forum-shop by removing [actions] to federal court . . . [which are] brought in non-Cook County areas of the Northern District of Illinois, in which . . . [the defendant] wants to avail itself of the law of the First District of the Illinois Appellate Court.<sup>228</sup>

[At this point the authors intrude into the debate to illustrate how the lack of geographical coincidence applies also to Florida. See Appendix A].

#### 4. The Shadur Sidestep

Judge Shadur subsequently modified his position to sidestep this criticism of his approach. He indicated that his adherence to Illinois' internal choice of law rules, regarding the binding effect on intermediate appellate decisions on state trial courts,

should not be misread as automatically looking to the Illinois Appellate Court for the First District just because this Court sits (in the literal physical sense) within that District. Such an approach could of course lead to exactly the same kind of forum shopping [which] *Erie* and this Court seek to avoid. What proper analysis calls for is a two-step inquiry: First, the federal court must determine which is the proper Appellate District to look to (in a case originally filed in this District Court, that is a function of the Illinois venue provisions that would have controlled the plaintiff's choice had the suit been filed in state court; in a removed case, the location of the state court where suit *was* filed provides the precise and obvious answer). Second, only then does the federal court ascertain the applicable state law as in force in that Appellate District (including, if relevant, the use of the . . . [state internal choice-of-law] rule).<sup>229</sup>

#### 5. Agreement on Intradistrict Conflicts

When there is a conflict between decisions of the same Illinois state

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228. *Kelly v. Stratton*, 552 F. Supp. 641, 644-45 (N.D. Ill. 1982).

229. *Rizzo*, 632 F. Supp. at 1132-33.

district appellate court, Judge Shadur takes the position that he should then rule as he thinks the state supreme court would rule.<sup>230</sup>

### G. Florida Federal Courts

Most federal courts agree with Judge Marshall's view that federal courts should decide issues of state law based on the way they think those issues would be decided by the highest court in the state—while at the same time giving proper deference to state intermediate appellate court decisions.<sup>231</sup> One commentator who recently reviewed the problem says that, "[e]xtensive research has disclosed only two cases in which other federal judges perceive their *Erie* role as somewhat akin to Judge Shadur's view."<sup>232</sup> However, to the extent that those two cases can be considered "holdings," they are binding on federal courts in Florida.<sup>233</sup>

In *Farmer v. Travelers Indemnity Co.*,<sup>234</sup> the Fifth Circuit panel said:

Although not all Florida District Courts of Appeal have decided the question and the matter may be finally resolved as a matter of Florida law by the Florida Supreme Court, the Second District Court of Appeal has decided the matter. A state action by this Lee County plaintiff would have been reviewed by the Second District. Undoubtedly the trial court and the Second District would have followed the recent Second District opinion. Thus, the same law has been applied in federal court as would have been applied in the specific courts available to plaintiff in the state system.<sup>235</sup>

The *Farmer* court would not certify the question to the Florida Supreme Court, warning that: "It is not the proper office of the certification procedure to permit a party, by choosing a federal over a state forum, to get the

230. *Bonanno v. Potthoff*, 527 F. Supp. 561, 563 (N.D. Ill. 1981); *Commercial Discount Corp. v. King*, 552 F. Supp. 841, 845 (N.D. Ill. 1982).

231. See generally 19 PRACTICE AND PROCEDURE, *supra* note 144, at 88-103.

232. *Yonover*, *supra* note 223, at 28 n.184.

233. *Farmer v. Travelers Indem. Co.*, 539 F.2d 562 (5th Cir. 1976), and *Peoples Bank v. Roberts*, 779 F.2d 1544 (11th Cir. 1986), both involved federal courts applying Florida state law. The Eleventh Circuit has ruled that Fifth Circuit cases decided before September 30, 1981, are binding on judges within the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc). The *Bonner* case also adopted the Fifth Circuit rule that "a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc." *Id.* at 1209.

234. *Farmer*, 539 F.2d at 562.

235. *Id.* at 563 (citations omitted) (emphasis added).

Florida Supreme Court's attention through this Court to issues which that Court [the Florida Supreme Court] has refused to accept from state litigants."<sup>236</sup>

*Farmer* was easy; there were two intermediate appellate cases that had both decided the same way. The only two United States Supreme Court cases cited by the court were *Erie* and *Hanna v. Plumer*.<sup>237</sup> *Hanna* had little to do with determining the content of state law, but it did mention the "twin aims" of *Erie*.<sup>238</sup>

The Eleventh Circuit case of *Peoples Bank v. Roberts*<sup>239</sup> presented a slightly more complex problem, while at the same time predicting that more complex problems were to come. The question of state law had been decided the same way by all five state appellate courts of appeal. Only one case had deviated from the majority, a 1984 decision by the Third District. An earlier Third District case, decided in 1976, had gone along with what was then a unanimous majority. The case before the Eleventh Circuit would have been reviewed by the Second District had it been brought in state court, and that district went along with the majority. The Eleventh Circuit panel said:

Although the intermediate court decisions are not unanimous, we accept the overwhelming majority rule as controlling state law for two reasons: First, there is no indication the Florida Supreme Court would decide the issue otherwise, and second, it is the law that would have been applied "in the specific courts available to plaintiff in the state system."<sup>240</sup>

*Peoples Bank* was also a relatively easy case, but it began to sow the seeds of a real dilemma. The first (Judge Marshall's view) and second (Judge Shadur's view) reasons given in the paragraph above just happen to be in harmony. However, the federal trial judge is faced with a dilemma when he thinks the Florida Supreme Court would decide the case as the majority had decided, but also believes that a different rule would be applied in the specific courts available to plaintiff in the state system. In addition, the Florida Supreme Court may have refused to review the issue for state litigants.

Under the Florida certification procedure, the federal trial court cannot

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236. *Id.*

237. *Id.*

238. *Hanna*, 380 U.S. at 460; see also *supra* note 169 and accompanying text.

239. 779 F.2d 1544 (11th Cir. 1986).

240. *Id.* at 1546 (quoting *Farmer*, 539 F.2d at 563).

certify.<sup>241</sup> The Eleventh Circuit has said that its panels are bound by Fifth Circuit decisions, and the Fifth Circuit said, in *Farmer*, that it is not proper to certify questions on issues which the Florida Supreme Court has refused to accept from state litigants.<sup>242</sup>

To the extent that what the Fifth Circuit said in *Farmer* and what the Eleventh Circuit said in *Peoples Bank* can be considered holdings, the Eleventh Circuit may have just tied itself into a Gordian knot; a knot which could only be cut by an en banc proceeding or by a United States Supreme Court holding. True, there is language in both *Farmer* and *Peoples Bank* which leaves it open for a court to follow the state supreme court predictive approach. However, the opinions taken together are at best ambiguous.

A federal trial judge hearing a case with the same legal issue as the one in *Peoples Bank* would be without guidance if the state court venue had been the Third District.<sup>243</sup> Which part of the *Peoples Bank* holding should the judge follow when there is no reason to believe that the Florida Supreme Court would decide one way or the other? Should the judge follow the rule of the majority, or the rule that would bind a state judge in the Third District?<sup>244</sup> Although the matter is far from certain, it appears that Judge Shadur's viewpoint<sup>245</sup> has at least some vitality in the Eleventh Circuit.

In many instances Florida provides for statewide venue.<sup>246</sup> Of the

241. Of course, the trial judge could always certify the question to the Eleventh Circuit under 28 U.S.C. § 1292(b) (1992), and that court could then certify under article V, section 3(b)(6) of the Florida Constitution, Florida Statutes section 25.031 (1993), and Florida Rule of Appellate Procedure 9.150.

242. *Farmer*, 539 F.2d at 563.

243. The problem raised in the substantive issue in *Peoples Bank* must have been fairly common, otherwise it would not have been litigated so many times. Thus, it is not difficult to believe that the problem arises often in Florida's most populous county, which is included within the Third District.

244. The situation in *Peoples Bank* involved two Third District opinions: a 1976 case that was in the majority, and a 1984 case that was the sole minority position among the appellate courts. Does this provide the solution, or does it merely raise more questions? Should the federal judge follow the later case on the theory that, as presently constituted, the Third District today would be more likely to follow it, or should the judge follow the earlier case, either because it was first, or because it is in the majority, or both? Although the Supreme Court of Florida has said that the later panel overrules the former panel, *State v. Walker*, 593 So. 2d 1049 (Fla. 1992), this does not necessarily mean that the supreme court itself would follow the holding of the second panel.

245. See *supra* notes 216-30 and accompanying text.

246. The general venue statute, Florida Statutes section 47.011 (1991), does not apply to non-residents. Thus, transitory state court actions may be brought against non-residents in any county. Corporations, domestic and foreign, who do business on a statewide basis are particularly vulnerable to suit in almost any of the five appellate districts under Florida

three federal districts in Florida, only the northern is located entirely within one state appellate district.<sup>247</sup> What is supposed to happen, under the *Farmer* and *Peoples Bank* holdings, when venue is properly laid in United States District Court for the Middle District of Florida, and the same suit could have been filed properly in a state court in either the First, Second, or Fifth Districts of the state appellate system? If there are conflicting decisions among those state districts, which should be applied? Should it matter whether the case was brought originally to the federal court, or whether it was removed there? For example, in *Farmer*, the Fifth Circuit was reviewing a case from the federal district court of the Middle District of Florida. The federal Middle District includes counties within the venue of the state's First, Second, and Fifth District Courts of Appeal.<sup>248</sup> The *Farmer* court said that a state action by "this Lee County plaintiff would have been reviewed by the Second District,"<sup>249</sup> which would have followed the recent Second District opinion that the Fifth Circuit applied. The assumption is that the Lee County plaintiff would have filed any state action in Lee County within the second district. The plaintiff might well have found state venue proper for a suit against the corporate defendant in Osceola County, which is within the Fifth District, and brought his hypothetical state action there. If the Fifth District substantive rule conflicted with the Second District rule, how would the federal Middle District judge know which to apply, since, in fact, the Lee County plaintiff did not actually file in any state court?

One more possibility exists, which if not a Gordian knot is at least a jurisprudentially awkward situation. Under Judge Shadur's view the same judge may apply the law of Florida differently to similar cases. The federal Southern District includes counties within the venue of the state's Second, Third, and Fourth District Courts of Appeal.<sup>250</sup> Federal District Judge Wisely, of the Southern District of Florida, has two cases on her diversity docket on a given day. They raise identical questions of law. The "proper venue" of the one, if it had been brought in state court, would be Dade County in the state's Third District. The proper venue of the other would have been in Broward County in the Fourth District. Decisions of the courts of appeal for the Third District conflict with those of the Fourth District. Judge Wisely rules in favor of one plaintiff and the next hour in the same

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Statutes section 47.051 (1991).

247. See Appendix A.

248. See *id.*

249. *Farmer*, 539 F.2d at 563.

250. See Appendix A.



courtroom rules against the other plaintiff. These results might be difficult to explain to laypersons, seeking equality under "the law of Florida."<sup>251</sup>

Neither the United States Supreme Court nor the Eleventh Circuit Court of Appeals has considered these issues of applying state law where there are intrastate conflicts.

#### H. *Can the Dilemma be Avoided—Abstention and Certification*<sup>252</sup>

There are some instances where federal courts can avoid deciding issues of state law, and thus avoid the problem of conflicting state appellate court decisions. In certain cases it is appropriate for a federal court to abstain from deciding the case. However, cases where abstention is proper are relatively rare.<sup>253</sup> The Supreme Court has held that "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."<sup>254</sup>

In some instances the dilemma can be avoided through the process of certification of questions of state law to the Florida Supreme Court.<sup>255</sup>

251. Where interstate conflicts exist, similar results could occur. For example, where multiple parties are involved in one occurrence, different state laws may apply to different parties. However, that situation strikes the objective observer less heavily because different substantive rules among states are inherent in the federal system.

252. Only 12 states and the District of Columbia lack some certification procedure. Of those that have adopted it, eight (including Florida) make certification of questions of state law to the highest state court available only to federal circuit courts and the United States Supreme Court. The other states and Puerto Rico allow certification by federal district courts. Thirteen states and Puerto Rico allow certification from courts of other states. See Yonover, *supra* note 223, at 16-17 (citing the various state statutes, rules, and constitutional provisions dealing with certification).

253. For a discussion of the various abstention doctrines, see 17A PRACTICE AND PROCEDURE, *supra* note 144, §§ 4241-47.

254. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943).

255. FLA. CONST. art. V, § 3(b)(6); FLA. STAT. § 25.031 (1993); FLA. APP. R. 9.150. On the process of certification, see generally Larry M. Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1 (1979); Robert B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888 (1971); Vincent L. McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33 (1964); 17A Practice and Procedure, *supra* note 144, § 4248. One problem with certification is that it has the potential for creating long delays in adjudication of private disputes. See Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U.

However, Florida's federal trial courts are not permitted to certify questions of state law to the Florida Supreme Court. Only federal appellate courts and the United States Supreme Court have that privilege. Given the limited jurisdiction of the Florida Supreme Court available to state litigants, it may be that federal court certification is the best strategy for a litigant to get a question answered by the Florida Supreme Court.<sup>256</sup> This strategy may give federal litigants an advantage over state litigants. It may further disadvantage all state litigants by tying up the supreme court's docket with federally certified questions.<sup>257</sup>

Though some problems can be avoided by use of abstention and certification, those devices are of only limited utility given the myriad of problems surrounding conflicting state appellate decisions. Abstention is usually inappropriate or forbidden, and certification is often impractical—if not for the litigants,<sup>258</sup> then for the courts that are involved.

#### I. *When Abstention is Unavailable and Certification Impractical—What Then?*

What should a federal judge do when faced with conflicting decisions by state intermediate appellate courts? Is Judge Marshall correct in saying that he is bound by *Bosch* and the decisions of his circuit court to follow the state supreme court predictive approach; or, is Judge Shadur right when he says that he is not bound by those same holdings because those courts did

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MIAMI L. REV. 717 (1969).

256. *But see supra* text accompanying note 236.

257. In *Thiry v. Atlantic Monthly Co.*, 445 P.2d 1012 (Wash. 1968), a question of state law had been certified by a United States District Court to the Supreme Court of Washington. An obviously disgruntled Judge Hale dissented, and stated: "The question of speed, of course, gives rise to another question of policy. At the time the instant case was argued in this court . . . , this court had pending a backlog of approximately 700 cases, some of which were of high precedential value and of exigent importance to the parties." *Id.* at 1014-15 (Hale, J., dissenting).

258. *See Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting), *rev'd on other grounds*, 377 U.S. 179 (1964).

Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.

*Id.*

not consider the problem in the context of states' internal choice of law rules?

Since the United States Supreme Court has never addressed the problem, it seems that the only way to solve it is to use a United States Supreme Court predictive approach. Would the United States Supreme Court hold that in deciding issues of state law, consideration should be given to a state's internal choice of law rules? Should it matter whether a state has a viable certification process whereby federal courts can certify questions of state law to the highest state court? These and similar questions can only be answered by the United States Supreme Court. If the past is any guide, it may take years for the answers to come.

Meanwhile, state and federal judges (and no doubt many lawyers) deplore the problem of conflicting intermediate appellate court decisions. Judge Marshall has mentioned "the confusion engendered by the failure of the various districts and divisions of the appellate court to follow each others' rulings . . . ."<sup>259</sup> While this is perhaps lamentable, it nevertheless reflects 'state law' within the meaning of *Erie* and we are therefore required to take account of it."<sup>260</sup>

Similar concern was expressed by Florida Supreme Court Justice James C. Adkins concurring in the adoption of the Florida Rules of Appellate Procedure. While concurring in their adoption, Justice Adkins pointed out that

the present rules of appellate procedure fail to solve a problem which is causing confusion in the case law of Florida. The district courts of appeal are frequently expressly recognizing in opinions that a decision is in conflict with a sister district court. Unless one of the parties brings a petition for certiorari to this Court the conflict remains in the reported case law and the trial judge is faced with the dilemma of selecting one of two conflicting district courts of appeals decisions as the proper case law. *The law is unsettled.*<sup>261</sup>

#### IV. RECOMMENDATIONS

The Florida legal system has a long history of cooperation with the

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259. *Roberts v. Western-Southern Life Ins. Co.*, 568 F. Supp. 536, 541 n.8 (N.D. Ill. 1983) (citing *Mattis & Yalowitz*, *supra* note 190, at 571).

260. *Id.*

261. *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d at 1123-25 (Adkins, J., concurring) (emphasis added).

federal judiciary. Florida was the first state to have a process whereby federal courts could certify questions of Florida law to the state supreme court. Florida was the first state to have that process approved by the United States Supreme Court. The Florida Legislature adopted its certification statute in 1945.<sup>262</sup> In *Clay v. Sun Insurance Office, Ltd.*,<sup>263</sup> Justice Frankfurter credited the Florida Legislature with “rare foresight” in dealing with “the problem of authoritatively determining unresolved state law involved in federal litigation by [enacting] a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision.”<sup>264</sup> The statute lay dormant until the United States Supreme Court suggested, in the *Clay* opinion, that Florida adopt a procedure for its use. A procedure was adopted,<sup>265</sup> and the state law question in *Clay* was certified to the Supreme Court of Florida.<sup>266</sup> Subsequently, the procedure was made part of the state constitution.<sup>267</sup>

Florida is a cosmopolitan state and much of the work of the relevant federal courts is the business of Florida. Nonetheless, the burden of this article is not to suggest changes in Florida’s stare decisis approach merely to facilitate the work of federal judges who must apply “the law of Florida.” All Florida citizens, those who litigate in state courts as well as federal courts and those who plan transactions to which Florida law might apply, will benefit by a greater respect for the effect of the doctrine of stare decisis on court decisions. We recommend that horizontal precedential effect be accorded to decisions of Florida’s courts of appeal. We begin by examining the experience of a state where that solution has been tried.

#### A. *A Model for Statewide Stare Decisis*

Until about three years ago, the problem of unresolved conflicts among decisions of Michigan’s intermediate appellate court had become scandalous.<sup>268</sup> Although that state has only one such court, the Michigan Court of Appeals,<sup>269</sup> the twenty-four judges<sup>270</sup> are elected from three judicial

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262. FLA. STAT. § 25.031 (1946).

263. 363 U.S. at 207.

264. *Id.* at 212 (citing FLA. STAT. § 25.031 (Supp. 1957)).

265. FLA. R. APP. P. 4.61 (current version at FLA. R. APP. P. 9.150).

266. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 737 (Fla. 1961).

267. FLA. CONST. art. V, § 3(b)(6).

268. Edward M. Wise, *The Legal Culture of Troglodytes: Conflicts between Panels of the Court of Appeals*, 37 WAYNE L. REV. 313 (1991); see also Mattis, *Stare Decisis Michigan*, *supra* note 191, at 265.

269. MICH. CONST. art. VI, § 1.

270. MICH. COMP. LAWS ANN. § 600.301 (Supp. 1993).

districts<sup>271</sup> and sit, rotating in several locations around the state, in panels of three.<sup>272</sup> Before November 1, 1990, the stare decisis rules in Michigan were: 1) all trial courts were bound by the decision of a panel of the court of appeals (vertical stare decisis obtained), but 2) one panel of the court of appeals was not bound by the decision of any other panel (horizontal stare decisis was not honored).<sup>273</sup> The similarity between Michigan's pre-1990 approach and Florida's present approach, despite the difference in judicial structure, is manifested in a quotation often repeated in Michigan cases that sounds like Chief Justice Barkett's recent statement about Florida stare decisis. The Michigan Court of Appeals stated:

While decisions of this Court [of appeals] are not precedent setting in the sense that subsequent panels of this Court are bound to follow earlier opinions, "a decision of any division of this Court is controlling statewide until a contrary decision is reached by another division on the identical question or until such decision is reversed by the Supreme Court."<sup>274</sup>

Not surprisingly, a chaos of conflicting decisions reigned in Michigan.<sup>275</sup> Later decisions did not purport to overrule prior inconsistent decisions, but one panel would merely shrug off authority that it did not

271. *Id.* § 600.302.

272. MICH. CT. R. 7.201(D), 7.201(F).

273. Mattis, *Stare Decisis Michigan*, *supra* note 191, at 272-85.

274. *City of Detroit v. Recorder's Court Traffic & Ordinance Judge*, 304 N.W.2d 829, 835 (Mich. Ct. App. 1981) (quoting *Hackett v. Kress*, 133 N.W.2d 221, 223 (Mich. Ct. App. 1965)).

Compare the Michigan quotation with Chief Justice Barkett's statement that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by the supreme court, that in the absence of interdistrict conflict, district court decisions bind all Florida trial courts, and that "[c]ontrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive." *Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992).

275. See Wise, *supra* note 268, at 318; see also Mattis, *Stare Decisis Michigan*, *supra* note 191, at 274-301. For example, on the issue of whether a third party could testify about an out-of-court identification of a criminal defendant made by another witness, the court of appeals held such testimony inadmissible 12 times, admissible nine times, and one time it declined to decide because of the harmless error rule. *People v. Malone*, 483 N.W.2d 470, 474 (Mich. Ct. App. 1992) (Connor, J., concurring) (citing *People v. Newcomb*, 476 N.W.2d 749, 752 (Mich. Ct. App. 1991), *appeal denied*, 483 N.W.2d 904 (Mich. 1992)). The conflict was ultimately resolved by the court of appeals pursuant to Administrative Order No. 1990-6. See *Newcomb*, 476 N.W.2d at 752.

choose to follow.<sup>276</sup> Then in late 1990 the Supreme Court of Michigan<sup>277</sup> promulgated Administrative Order 1990-6 designed to end the crisis.<sup>278</sup> It has succeeded very well.

The most dramatic part of Administrative Order 1990-6 is its first sentence: "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990."<sup>279</sup> The published decision remains controlling authority unless reversed, modified, or overruled by the supreme court or a special panel of the court of appeals. Provision is made for convening a special panel where a panel indicates in the text of its opinion that it follows a prior published decision only because it is required to do so by Administrative Order 1990-6. In other words, the disgruntled panel may trigger the conditions necessary for convening the special panel, but it must follow the prior decision. The new order neatly avoids a conflict in the appellate court. If a majority of the appellate judges believe that the issue merits further attention, then twelve judges are selected who together with the chief judge form the special panel. The panel decision is vacated and the special panel resolves the matter by a decision that is binding statewide upon the court of appeals as well as upon all lower courts, unless reversed or modified by the Michigan Supreme Court.<sup>280</sup>

The horizontal stare decisis rule has worked well in Michigan. Without the convening of a special panel, conflicts existing before November 1, 1990, have been resolved in numerous cases<sup>281</sup> by a published panel

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276. Mattis, *Stare Decisis Michigan*, *supra* note 191, at 274-99. Dean Wise's observation that refusing to follow a prior decision is in fact no different from overruling it, is highly persuasive. Wise, *supra* note 268, at 321.

277. The supreme court shall prescribe the rules for the practice and procedure of the court of appeals. MICH. CONST. art. 6, § 10.

278. Administrative Order No. 1990-6, 436 Mich. lxxxiv (1990), was effective November 1, 1990, and was to remain in effect until December 31, 1991. It was continued in effect by Administrative Order No. 1991-11, 439 Mich. cxliv (1991), until December 31, 1992, and by Administrative Order No. 1992-8, 441 Mich. lii (1992), until December 31, 1993. See *Jennings v. Southwood*, 499 N.W.2d 460, 464 (Mich. Ct. App. 1993) (Neff, J., concurring).

279. Administrative Order No. 1990-6, 436 Mich. xxxiv (1990).

280. *Id.* A petition to convene a special panel is not a prerequisite to filing an application for leave to appeal to the Michigan Supreme Court from the panel decision. *Id.*

281. *Gonyea v. Motor Parts Fed. Credit Union*, 480 N.W.2d 297 (Mich. Ct. App. 1991) (cited in *Rouch v. Enquirer & News of Battle Creek Michigan*, 487 N.W.2d 205, 221 (Mich. 1992) (Riley, J., concurring) as "controlling authority" and "binding precedent") (followed in *Prysak v. R.L. Polk Co.*, 483 N.W.2d 629, 636 (Mich. Ct. App. 1992)); *People v. Lannom*, 480 N.W.2d 321 (Mich. Ct. App.), *aff'd*, 490 N.W.2d 396, 398 (Mich. 1992) (per curiam).

decision issued after November 1, 1990, that pursuant to Administrative Order 1990-6 binds all panels.<sup>282</sup> Conflicts that would have been created were it not for Administrative Order 1990-6 have been avoided in cases where the deciding panel expressly indicated that but for Administrative Order 1990-6 it would rule contrary to a prior decision.<sup>283</sup> In many other

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One justice would have denied leave to appeal to the supreme court because the split of authority in the court of appeals was resolved by a "first out" opinion under the Administrative Order. *Id.* at 399 (Levin, J., separate opinion). Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 496 N.W.2d 373 (Mich. Ct. App. 1992), *appeal granted*, 506 N.W.2d 877 (1993); People v. Gardner, 487 N.W.2d 515 (Mich. Ct. App. 1992) (noting case discussed and followed in People v. Parr, 494 N.W.2d 768, 771 (Mich. Ct. App. 1992) (Corrigan, J., concurring) (questioning the majority analysis of *Gardner*), *appeal denied*, 505 N.W.2d 585 (Mich. 1993)); Rouse v. Wesley, 494 N.W.2d 7 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 440 (Mich. 1993); Auto Club Ins. Ass'n v. Frederick & Herrud, Inc., 479 N.W.2d 18 (Mich. Ct. App. 1991) (resolving on remand a complex ERISA issue, according to Wolverine Mut. Ins. Co. v. Rospatch Corp. Employee Benefit Plan, 489 N.W.2d 204, 207 n.3 (Mich. Ct. App. 1992)), *appeal granted*, 491 N.W.2d 571 (Mich. 1992); Brown v. Brown, 480 N.W.2d 292 (1991) (seeking grandparents' visitation rights); People v. Landt, 469 N.W.2d 37 (Mich. Ct. App.), *rev'd*, 475 N.W.2d 825 (Mich. 1991) (noting discussion in People v. Schollaert, 486 N.W.2d 312, 317 n.5 (Mich. Ct. App.), *appeal denied*, 494 N.W.2d 750 (Mich. 1992)); People v. Punga, 465 N.W.2d 53 (Mich. Ct. App. 1991); Postema v. Postema, 471 N.W.2d 912 (Mich. Ct. App. 1991) (resolving long-standing conflict regarding postgraduate degree as a divisible marital asset); Smith v. Michigan Bell Tel. Co., 472 N.W.2d 32 (Mich. Ct. App. 1991).

282. The rule that a post November 1, 1990, decision of a panel binds all panels of the court of appeals is now well accepted. In addition to the results and language of the cases cited in notes 239-40 *supra*, the court of appeals sometimes notes that its decision creates a new rule of law that will bind in the future. *E.g.*, Borman v. State Farm Fire & Cas. Co., 499 N.W.2d 419, 422 (Mich. Ct. App. 1993) (following a pre-Administrative Order decision); Brown v. Yousif, 499 N.W.2d 446, 450 (Mich. Ct. App. 1993); Rowell v. Security Steel Processing Co., 491 N.W.2d 265, 266 (Mich. Ct. App. 1992), *appeal granted in part*, 500 N.W.2d 469 (Mich. 1993).

283. The court in Fetz Eng'g Co. v. Ecco Sys., Inc., 471 N.W.2d 85, 87 (Mich. Ct. App. 1991), *vacated*, 483 N.W.2d 619 (Mich. 1992), said that the precedent case was wrongly decided and that it followed that case only because it was required to do so by Administrative Order No. 1990-6. A petition to submit *Fetz* to a special panel pursuant to Administrative Order No. 1990-6 was denied. The supreme court granted leave to appeal, (as explained in Dane Constr., Inc. v. Royal's Wine & Deli, Inc., 480 N.W.2d 343, 344 n.1 (Mich. Ct. App. 1991), *appeal denied*, 486 N.W.2d 747 (Mich. 1992)), vacated the court of appeals opinion, and remanded to the trial court. *Fetz*, 483 N.W.2d at 619.

Other cases where a conflict would have been created but for Administrative Order No. 1990-6 are: People v. Hadley, 501 N.W.2d 219 (Mich. Ct. App. 1993) (dissenting judge believed prior decisions were distinguishable); Generou v. Kalamazoo Regional Psychiatric Hosp., 480 N.W.2d 638, 639 (Mich. Ct. App. 1991), *appeal denied*, 486 N.W.2d 733 (Mich. 1992); People v. Martinez, 485 N.W.2d 124 (Mich. Ct. App. 1992); Askwith v. City of Sault

cases the reluctant compliance of a panel in following a prior published panel decision under Administrative Order 1990-6 indicates that a conflict might well have been created but for the order.<sup>284</sup> A jurisprudentially sound deference for stare decisis is manifested in those cases that merely follow the horizontal precedent as required by the Administrative Order, without further significant comment.<sup>285</sup>

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Ste. Marie, 477 N.W.2d 448 (Mich. Ct. App. 1991) (concurring judge believed that precedent case was correctly decided); Makky v. General Dynamics Land Sys., Inc., 486 N.W.2d 309 (Mich. Ct. App. 1992), *appeal denied*, 508 N.W.2d 507 (Mich. 1993); Benson v. Callahan Mining Corp., 479 N.W.2d 12 (Mich. Ct. App. 1991), *appeal denied*, 485 N.W.2d 501 (Mich. 1992).

284. E.g., Jenerou v. Jenerou, 503 N.W.2d 744 (Mich. Ct. App. 1993); People v. Stein, Nos. 142771, 88-502, 1993 WL 195679 (Mich. Ct. App. June 8, 1993); Warden v. Fenton Lanes, Inc., 495 N.W.2d 849, 854 (Mich. Ct. App. 1992), *appeal granted in part*, 506 N.W.2d 877 (Mich. 1993); People v. Landis, 494 N.W.2d 865 (Mich. Ct. App. 1992), *appeal denied*, 505 N.W.2d 584 (Mich. 1993); State Farm Fire & Cas. Co. v. Fisher, 481 N.W.2d 743, 746 (Mich. Ct. App. 1991), *appeal denied*, 496 N.W.2d 294 (Mich. 1993).

285. E.g., Jennings v. Southwood, 499 N.W.2d 460 (Mich. Ct. App. 1993); Lombardi v. William Beaumont Hosp., 502 N.W.2d 736, 741 (Mich. Ct. App. 1993) (noting that to the extent the "suggesting" in a later 1991 decision conflicted with an earlier 1991 decision, the earlier 1991 decision "is controlling authority under Administrative Order Nos. 1990-6 and 1992-8, since the *Sobh* [earlier] preceded the *Bachula* [later] by several months"); People v. Cutchall, 504 N.W.2d 666, 672 (Mich. Ct. App. 1993) (following People v. Buck, 496 N.W.2d 321 (Mich. Ct. App. 1992), without further comment; concurring opinion would rule otherwise were it not for the prior decision); People v. Gallego, 502 N.W.2d 358 (Mich. Ct. App. 1993); Holland v. Liedel, 494 N.W.2d 772, 775 n.1 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 910 (Mich. 1993); Keen v. Keen, 486 N.W.2d 105, 106 (Mich. Ct. App. 1992); Pavlov v. Community Emergency Medical Serv., Inc., 491 N.W.2d 874, 879 (Mich. Ct. App. 1992), *appeal denied*, 500 N.W.2d 478 (Mich. 1993); People v. Buck, 496 N.W.2d 321, 334 (Mich. Ct. App. 1992), *appeal denied*, 498 N.W.2d 742 (Mich. 1993) (following post-Administrative Order decisions of panels of the court of appeals on three issues, one of which was then pending before the supreme court: "until such time as our Supreme Court decides the issue, we are bound by *Deans*"); People v. Malone, 483 N.W.2d 470, 472 (Mich. Ct. App. 1992), *appeal granted in part*, 500 N.W.2d 470 (Mich. 1993); People v. Spearman, 491 N.W.2d 606, 611 (Mich. Ct. App. 1992), *appeal denied*, 497 N.W.2d 188 (Mich.), *rev'd in part sub nom.* People v. Rush 504 N.W.2d 185 (Mich. 1993); Prysak v. R.L. Polk Co., 483 N.W.2d 629, 636 (Mich. Ct. App. 1992); Reese v. County of Wayne, 483 N.W.2d 671, 672 (Mich. Ct. App.) (seeing "no reason to disagree"), *appeal denied*, 495 N.W.2d 382 (Mich. 1992); Richardson v. Warren Consol. School Dist., 496 N.W.2d 380, 382 (Mich. Ct. App. 1992); Thompson v. Fitzpatrick, 501 N.W.2d 172 (Mich. Ct. App. 1992), *appeal denied*, 503 N.W.2d 911 (Mich. 1993); People v. Milton, 478 N.W.2d 740 (Mich. Ct. App. 1991), *appeal denied*, 494 N.W.2d 745 (Mich. 1992); People v. Williams, 477 N.W.2d 877 (Mich. Ct. App. 1991), *appeal denied*, 479 N.W.2d 697 (Mich. 1992); People v. Williams, 473 N.W.2d 727 (Mich. Ct. App. 1991) (following a post-Administrative Order published panel decision that was later overruled by special panel in People v. Hill, 480 N.W.2d 913 (Mich. Ct. App.



In the almost three years of the operation of Administrative Order 1990-6 special panels have convened only three times.<sup>286</sup> Were it not for Administrative Order 1990-6, the Supreme Court of Michigan would have had the duty to resolve conflicts not only in these three cases but in the many others that the court of appeals resolved and avoided without special panel treatment.<sup>287</sup>

Even though Administrative Order 1990-6 has proved generally

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1991), *appeal denied*, 480 N.W.2d 909 (Mich. 1992) in a seven to six decision), *appeal denied*, 478 N.W.2d 473 (Mich. 1991); Yarrick v. Village of Kent City, 473 N.W.2d 774, 775 (Mich. Ct. App. 1991), *vacated*, 489 N.W.2d 82 (Mich. 1992).

Occasionally a panel follows horizontal precedent noting that it agrees with the prior decision. *E.g.*, Wolverine Mut. Ins. Co. v. Rospatch Corp. Employee Benefit Plan, 489 N.W.2d 204, 207 (Mich. Ct. App. 1992); People v. Watts, 464 N.W.2d 715, 716 (Mich. Ct. App. 1991), *appeal denied*, 478 N.W.2d 90 (Mich. 1991); National Indem. Co. v. Budget Rent-A-Car Sys[s], Inc., 489 N.W.2d 175, 177 n.1 (Mich. Ct. App. 1992) (agreeing with and following what was arguably dicta).

It would be difficult to ascertain the exact number of cases that have followed prior panel precedent because many decisions are unpublished. Of course, a panel is bound by post-November 1, 1990, published decisions, even though the deciding panel's decision is not to be published. Administrative Order No. 1990-6, 436 Mich. lxxxiv (1990); Keen v. Keen, 486 N.W.2d 105, 106 n.2 (Mich. Ct. App. 1992). Only published decisions, however, have precedential effect under the rule of stare decisis. MICH. CT. R. 7.215(C)(1); *see* Makowski v. Towles, 489 N.W.2d 133, 134 n.1 (Mich. Ct. App. 1992); People v. Polus, 495 N.W.2d 402, 405 (Mich. Ct. App. 1992).

286. Maner v. Ford Motor Co., 493 N.W.2d 909 (Mich. Ct. App. 1992) (resolving four year old conflict regarding deduction of other benefits from worker's compensation weekly wage loss payments), *aff'd*, 502 N.W.2d 197 (Mich. 1993); People v. Brashier, 496 N.W.2d 385 (Mich. Ct. App. 1992) (resolving sixteen year old conflict regarding the definition of "gross indecency"), *appeal granted*, 508 N.W.2d 490 (Mich. 1993); People v. Hill, 480 N.W.2d 913 (Mich. Ct. App. 1991) (noting justifications for sentencing judge's departure from mandatory minimum sentences), *appeal denied*, 480 N.W.2d 909 (Mich. 1992).

287. Sometimes the supreme court must resolve a conflict among court of appeals judges. One example is Bowie v. Arder, 490 N.W.2d 568 (Mich. Ct App. 1992). Panels of the court of appeals were having difficulty interpreting whether a supreme court decision related to the trial court's lack of subject matter jurisdiction or the parties' lack of standing. The later of two post-Administrative Order panel decisions distinguished the earlier one and said that the earlier interpretation of the supreme court decision was dicta. The supreme court then had to decide whether its prior decision rested on a lack of standing or subject matter jurisdiction. *Id.*

Following two post-Administrative Order panel decisions taking different viewpoints on whether a minor's estate as well as the minor's family could recover under the dramshop act (the latter labeling the former's interpretation dicta), the supreme court reversed both decisions and held that neither the estate nor the family could recover. *See* LaGuire v. Kain, 487 N.W.2d 389 (Mich. 1992); Estate of Kuikstra v. Cheers Good Time Saloons, Inc., 489 N.W.2d 468 (Mich. 1992).

successful, it was originally issued over the dissent of Justice Boyle. She objected that “[s]uch a momentous change in the legal culture of this state should be preceded by full research and study of such matters as the experience with the conflict question in the intermediate courts of appeals of our sister states . . . .”<sup>288</sup> Florida has an opportunity for such research and study during the years before the convening of the constitution revision commission.<sup>289</sup> The horizontal, or statewide stare decisis model may prove useful.

The similarity between Michigan’s pre-1990 approach and Florida’s present approach, despite the difference in judicial structure, has been noted.<sup>290</sup> We may now ask whether, in view of the difference in judicial structure, the conflict avoidance technique of a state with a unitary appellate court could be utilized in a state with multiple appellate courts. If a horizontal stare decisis model is desirable and practicable, we must then

288. Administrative Order No. 1990-6, 436 Mich. lxxxiv, lxxxvi (1990).

289. FLA. CONST. art. XI, § 2. Under article XI, section 2, of the Florida Constitution, the constitution revision commission will convene in 1998.

Other states where studies have been done include Illinois and New Mexico. Illinois is a unitary appellate court state, but unlike Michigan, it has not adopted horizontal stare decisis. ILL. CONST. art. VI, § 1. The judges of the Appellate Court of Illinois are elected from five judicial districts and each district must have at least one division to which at least three judges are assigned. *Id.* §§ 2, 5. No action has been taken to change the judge-made rules that a decision of the appellate court is not binding on the appellate court in “other appellate districts,” and is binding on the trial courts throughout the state. *State Farm Fire & Casualty Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992). The appellants in a more recent case contended that conflicts within the appellate court constituted grounds for reversal. *See* Brief for Appellant at 2, 12-15, *Roach v. Springfield Clinic*, 623 N.E.2d 246 (Ill. 1993). The supreme court, however, did not mention equal protection arguments in its opinion. *See* *Roach v. Springfield Clinic*, 623 N.E.2d 246 (Ill. 1993). Interestingly enough, however, the Illinois Supreme Court had previously talked in clear equal protection language a few years before when it said that “by granting these [Third District] defendants a new trial, we would be *unfairly discriminating* against other similarly situated defendants . . . who happened to be tried outside the third district.” *People v. Harris*, 526 N.E.2d 335, 341 (Ill. 1988), *cert. denied sub nom. Wilson v. Illinois*, 488 U.S. 902 (1988) (emphasis added). On the Illinois experience, see generally Mattis & Yalowitz, *supra* note 190, at 571 (advocating conflict avoidance); J. Timothy Eaton, et al., *Resolving Conflicts in the Illinois Appellate Court*, 78 ILL. B.J. 182 (1990) (recommending conflict resolution by a special panel of judges from the appellate court); *see also* Taylor Mattis, *Precedential Value of Decisions of the Court of Appeals of the State of New Mexico*, 22 N.M. L. REV. 535, 538 (1992) (discussing instructive dialogue between two New Mexico intermediate appellate court judges, found in *State v. Bothne*, No. 13,425 (N.M. Ct. App. Dec. 4), *cert. denied*, 822 P.2d 671 (N.M. 1991)).

290. *See supra* note 274 and accompanying text.

inquire whether the change should be by supreme court rule or precedent or by constitutional amendment.

## B. *Achieving Statewide Horizontal Stare Decisis in Florida*

### 1. The Principle

We might begin with formulating a principle and regime. For the time being, we shall call the former the Principle. The issue to be examined in the following subsection is whether any change should be made by supreme court rule or precedent or by constitutional amendment. The Principle might be stated:

Any panel of a district court of appeal must follow the holding of [or, the rule of law established by] a prior published decision of any district court of appeal issued on or after [the effective date of this enactment].

A choice of wording allows for consideration of which meaning is clearer: a “rule of law established by” a prior decision, or “the holding of” a prior decision. Either phrase would be more specific than “maintain[ing] uniformity in the court’s decisions,” under Florida Rule of Appellate Procedure 9.331, about which courts have a history of disagreement.<sup>291</sup> Probably, the “holding of” a prior case is the preferable terminology, even though legal scholars from law students to supreme court justices will disagree about what was the holding of a particular case. That inherent defect, if it is one, of the common-law system cannot be addressed here.

Consistent with *Department of Legal Affairs v. District Court of Appeal, 5th District*, only prior *published* decisions of district courts would be precedent.<sup>292</sup> Adoption of the Principle would mean that a panel of any district would be bound by the district court decision of its own or any other district. The “law of the district” would be replaced by “the law of Florida.” The need for resolution of intradistrict conflicts would exist no more, with the institution of statewide horizontal stare decisis.

Vertical stare decisis would continue, so that all trial courts would be bound by any district decision. No longer would it be said that “absent a conflicting district court decision,” a trial court is bound. The dilemmas now facing state and federal trial judges, federal appellate judges, as well as

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291. See *supra* notes 108-18 and accompanying text.

292. 434 So. 2d 310 (Fla. 1983).

litigants and legal counselors, would be eased.

Providing that published decisions have statewide precedential effect only after a certain date would prevent the confusion that would otherwise arise where conflicts presently exist. The district decision “first out” after enactment of the Principle would resolve the old conflict and stand as precedent for the future.

Let those who fear that uniformity of law within a particular jurisdiction means stagnation in the law<sup>293</sup> be comforted. That has not been the case in the jurisdictions that require horizontal stare decisis.<sup>294</sup> The foremost argument against that fear is that there is the Supreme Court of Florida, which this recommendation does not suggest abolishing. A decision made by the force of the Principle could be certified as a question of great importance, under article V, section 3(b)(4), of the Florida Constitution, as decisions in direct conflict with other district court decisions now are certified. At least since 1956, a primary motivation of constitutional amendments has been to free the supreme court to use its discretionary jurisdiction to decide matters of important public policy.<sup>295</sup> This proposal would foster that goal. Under the present system, if the supreme court chooses not to review, the conflict persists. Under the Principle, if the supreme court chose not to review, no conflict would have been created in the first place.

Moreover, even absent supreme court review, a decision of a district court of appeal would not be carved in stone. Procedures would be provided for a special en banc panel of district appellate judges to review rules of law to which the supreme court had not spoken.

## 2. Some Details

Provision should be made to implement a procedure whereby a limited number of district appellate judges could convene in a special en banc panel and review certain district court decisions. To trigger eligibility for such review, the panel opinion would have to state that the court is following a

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293. See, e.g., Administrative Order No. 1990-6, 436 Mich. lxxxiv, lxxxvi-vii (1990) (Boyle, J., dissenting) (stating “[c]onflict itself is neither bad or good; it may be an agent for change or the source of chaos”). The authors could not disagree more with the first clause. As for conflict’s being an agent for change, a “bad” law uniformly applied within a jurisdiction may well bring change more quickly than one applied willy-nilly to some parties while other parties get the benefit of the “good” law.

294. Compare the experiences of the United States Courts of Appeals that require horizontal stare decisis, as well as the experience of Michigan.

295. See Mattis, *Stare Decisis Florida*, *supra* note 23, at 144-45.

prior published decision only because it is required by the Principle to do so.<sup>296</sup> Upon the vote of a majority of the judges of the district courts,<sup>297</sup> the special en banc panel would convene. Perhaps too detailed for this article is the question of how many district judges should be on the en banc panel, or where it should meet. However, a judge or judges from each of the five districts should be included. Florida has already had experience with large en banc panels. In the present system for resolving intradistrict conflicts all the judges of each district—the thirteen judges of the First District, the twelve of the Second, the eleven of the Third, the twelve of the Fourth, and the nine of the Fifth—<sup>298</sup> are included in their respective intradistrict en banc panels.<sup>299</sup> Certainly the special en banc panel should not include all the appellate judges. Perhaps the five chief judges might be appropriate decision makers<sup>300</sup> and Tallahassee an appropriate meeting place. To the extent that convening a special en banc panel is burdensome, serious consideration will be given to triggering the mechanism.<sup>301</sup> Under the present system it is all too easy for a panel in one district, because of a slight preference for a different rule of law, to create a conflict by disagreeing and choosing not to follow the decision of another district. The administrative burden is a small price to pay if it will ameliorate the problems previously discussed.

The statement that the court is following a prior published decision only because it is required by the Principle should not automatically trigger a vote by all appellate judges on whether en banc treatment is desirable. Procedure could require that only an appellate judge could request the vote, or it might allow the parties to petition for special en banc treatment. Again, Florida could draw on its experience with intradistrict en banc procedure to inform this decision. Under the present rule an intradistrict hearing en banc may be ordered only by a district court on its motion, but a rehearing en banc may be ordered by the court on its own motion or on

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296. This might be called the “chopped hay” statement: The prior published decision that we must swallow goes down like chopped hay.

297. This would mean a majority of the appellate judges who participate in the vote. Cf. *In re* Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d 1127, 1129 (Fla. 1982) (interpreting Rule 9.331 to mean a majority of the appellate judges who participate in the vote).

298. FLA. STAT. § 35.06 (1990).

299. See FLA. R. APP. P. 9.331.

300. The chief judge of each of the district courts of appeal is selected by the members of the court of that district. FLA. STAT. § 35.12 (1991).

301. The special en banc panel of Michigan’s Court of Appeal has convened only three times in three years. See *supra* note 286 and accompanying text.

motion of a party.<sup>302</sup>

The authors apprehend no reason why the Principle of horizontal stare decisis should not be obtainable merely because Florida's appellate courts are multiple rather than unitary. Division of the state into districts should be retained for purposes of selection and retention of judges<sup>303</sup> and for the convenience of litigants. Despite retention of appellate districts, with statewide horizontal stare decisis, the notion of "five balkanized districts confederated into a loose Floridian union"<sup>304</sup> would tend to dissipate.

### *C. Constitutional Amendment, Supreme Court Rule, or Precedent?*

There are several choices as to how the Principle could be put into effect on a statewide basis. It could be done by legislation, constitutional amendment, supreme court rule, or precedent.

The powers of our state government are constitutionally allocated among the three branches in such a way that, although it does not enjoy an exclusive power to make substantive law, the legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches. Nevertheless, the executive and judicial branches have a certain amount of lawmaking power that is reserved to them under the principle of separation of governmental power, particularly in managing the details of the business that they are charged with managing under the constitution.

It seems to us that putting the Principle into effect by legislative act would leave the statute open to attack on the ground that it intrudes on the judiciary's power to manage its own affairs. We believe that the principle should be put into effect either by constitutional amendment, supreme court rule, or by precedent—preferably by constitutional amendment as to the basic Principle, and by supreme court rule as to the details.

#### 1. The Eleventh Circuit's Method of Adopting Stare Decisis

When the Fifth Circuit Court of Appeals was split into two circuits, the Fifth Circuit and the Eleventh Circuit, one of the first tasks undertaken by the new Eleventh Circuit was the adoption of a rule of stare decisis. The judges had concluded that they wanted to adopt the Fifth Circuit rule that

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302. Fla. R. App. P. 9.331.

303. See FLA. STAT. §§ 35.08, 35.10 (1991).

304. *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d Dist. Ct. App. 1991), *jurisdiction accepted*, 602 So. 2d 942 (Fla. 1992).

a prior decision of the circuit (panel or en banc) could not be overruled by a panel, but only by the court sitting en banc.<sup>305</sup> One problem facing the court was the question of whether the rule should be adopted by court rule, or by precedent (i.e., stare decisis).<sup>306</sup> There had been a great deal of discussion about this problem,<sup>307</sup> and the court finally decided to adopt the Fifth Circuit rule by precedent in *Bonner v. City of Prichard*,<sup>308</sup> the court's first case.

The court rejected the idea of adopting the rule by an informal and unrevealed consensus among the individual judges as being inconsistent with orderly administration of justice.<sup>309</sup> It would not give fair notice to litigants, courts, and government agencies of what to expect.<sup>310</sup> Moreover, without the "imprimatur" of judicial decision, such a rule could be upset by changes in the composition of the court.<sup>311</sup>

Also rejected was the idea of adopting the Fifth Circuit rule of stare decisis under the rule-making power of the court.<sup>312</sup> According to the court, neither the authorizing statute nor the Federal Rules of Appellate Procedure addresses the establishment of substantive law by the court.<sup>313</sup>

The judges of this court, when judges of the former Fifth Circuit, maintained a distinct separation between their administrative and their judicial functions. The substantive law of the circuit was established by the exercise of judicial authority and procedural rules by administrative action. We consider it inappropriate to decide what this circuit's substantive law will be by any means other than judicial decision.<sup>314</sup>

Of course the options open to the Eleventh Circuit were not as broad

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305. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

306. *Id.*

307. See generally Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687 (1981) (citing most of the discussion prior to the Eleventh Circuit's adoption of the rule).

308. *Bonner*, 661 F.2d at 1207.

309. *Id.* at 1210.

310. *Id.*

311. *Id.*

312. *Id.* In section 2071 of title 28 of the United States Code, Congress authorizes courts to prescribe rules for the conduct of their business. *Bonner*, 661 F.2d at 1211; see 28 U.S.C. § 2071 (1988). Rule 47 of the Federal Rules of Appellate Procedure adopted under authority of the statute, authorizes judges of the circuit to make rules of practice not inconsistent with the rules. *Bonner*, 661 F. 2d at 1211.

313. *Bonner*, 661 F.2d at 1211.

314. *Id.*

as the options under state law. As a practical matter, that court did not have the choice of legislation or constitutional amendment.

## 2. The Problem of Adoption by Supreme Court Rule

The Florida Constitution, article V, section 2 (a), provides:

The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.<sup>315</sup>

It is arguable that by negative implication, this section forbids the Supreme Court of Florida to use its rule-making power for the purpose of creating substantive law. The provision speaks only of "rules for the practice and procedure in all courts."<sup>316</sup> The Principle under discussion would quite obviously be the creation of an entire body of substantive law, and is itself a rule of substantive law.

In promulgating Florida Rule of Appellate Procedure 9.331, providing for intradistrict en banc decisions, the Supreme Court of Florida carefully considered its constitutionality.<sup>317</sup> Nonetheless, questions have persisted. The argument is this: because article V, section 4(a), of the Florida Constitution specifically provides that three judges shall consider each case heard by the district courts, a different procedure cannot be authorized by the promulgation of a court rule.<sup>318</sup> Similarly, and perhaps a fortiori, a supreme court rule establishing a special en banc panel crossing district lines might be questioned.

Most instructive is the position of the Florida Supreme Court. In 1982 the Florida Conference of District Court of Appeal Judges petitioned the

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315. FLA. CONST. art. V, § 2(a).

316. *Id.*

317. See *In re* Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Florida Rules of Appellate Procedure, 374 So. 2d 992, 993 (Fla. 1979), *modified*, 377 So. 2d 700 (Fla. 1979).

318. See *id.* at 995 (Boyd, J., dissenting); *State v. Georgoudiou*, 560 So. 2d 1241, 1247-48 (Fla. 5th Dist. Ct. App. 1990) (Coward, J., dissenting), *review denied*, 574 So. 2d 141 (Fla. 1990); *Carroll v. State*, 497 So. 2d 253 (Fla. 3d Dist. Ct. App. 1985) (Hubbart, J., dissenting), *review denied*, 511 So. 2d 297 (Fla. 1987).



supreme court to consider an emergency rule change to address practical problems that had arisen in the en banc decisional process.<sup>319</sup> The chief judges of the district courts asked whether one three judge panel could overrule or recede from a prior decision of a three judge panel of the same district court.<sup>320</sup> The supreme court responded, “[w]ithout addressing possible constitutional problems,” that *it would not by court rule* prohibit overruling or receding by a three judge panel, but it admonished the district judges to refrain from that action.<sup>321</sup>

Justice Ehrlich believed that “taking it upon ourselves [the supreme court] to define intra-district conflict for the districts themselves would be overreaching and presumptuous.”<sup>322</sup> If that is so, then the supreme court’s taking it upon itself to forbid interdistrict conflicts might also be overreaching. The authors suggest that adoption of the Principle of horizontal stare decisis by supreme court rule would raise issues of constitutionality that need not be faced. Supreme court rules for implementing the procedural aspects, once the Principle is adopted, would be the proper use of article V, section 2(a) of the constitution.

### 3. The Problem of Implementation by Decision

The Supreme Court of Florida could do what the Eleventh Circuit did by taking an appropriate case and putting the rule into effect in the process of deciding that case. The problem with that method is that, although it would have “the imprimatur of judicial decision,”<sup>323</sup> it would not carry the same precedential weight as the Eleventh Circuit’s decision did. There the court was adopting a well established rule that had been in effect in Florida, Georgia, and Alabama for decades (while these states were within the Fifth Circuit). The Florida rule would be brand new, and could be more easily upset by changes in the composition of the court simply because of its newness.

### 4. The Preferred Method—Constitutional Amendment

Putting the Principle into effect and establishing the special en banc panel by constitutional amendment would avoid many of the problems

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319. *In re* Rule 9.331 Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d at 1127.

320. *Id.*

321. *Id.* at 1128.

322. *Chase Fed. Sav. & Loan Ass’n v. Schreiber*, 479 So. 2d 90, 105 (Fla. 1985) (Ehrlich, J., concurring in part, dissenting in part), *cert. denied*, 476 U.S. 1160 (1986).

323. *See Bonner*, 661 F.2d at 1210.

suggested above, and would remove any questions as to the power of any particular branch of government to establish the rule. Just as a constitutional amendment removed any question of the power of the supreme court to "review a question of law certified" to it by a federal court,<sup>324</sup> so would a constitutional amendment remove any question of the power to require the district courts to follow prior published decisions of any district court. The Principle under discussion should be made a part of article V, section 4, of the Florida Constitution. The statement of the Principle should be followed by the provision for special en banc treatment by judges from each district. The section or subsection might read:

Any panel of a district court of appeal must follow the holding of [or, the rule of law established by] a prior published decision of any district court of appeal issued on or after [the effective date of this amendment]. When a panel of a district court of appeal states in its opinion that it is following a prior published decision only because it is required to do so, a special en banc panel of the district courts of appeal may convene to rehear the case for the purpose of resolving the conflict which would have been created but for this provision.

The amendment could also specifically allow for supreme court rule to fix the number of district judges to sit on the special en banc panel and to provide for the manner of their selection from among the district judges. As for implementing the rest of the practice and procedures, the present article V, section 2(a) should suffice.

Since the en banc procedure suggested here would amount to the creation of a new court, article V, section 1, should be amended to include such a court among those named in the first sentence. The first sentence would then read: "The judicial power shall be vested in a supreme court, *a special en banc panel of the district courts of appeal*, district courts of

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324. FLA. CONST. art. V, § 3(b)(6). In some early cases involving the certification procedure and abstention, it was questioned whether a state's highest court had the power to give what might arguably be an "advisory opinion." When the Fifth Circuit abstained from deciding a case in order to get an answer to a state law question from the state courts, the Supreme Court of Texas held that it was without power, under the state constitution, to render such an advisory opinion. *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 863 (Tex. 1965). The Supreme Court of Maine has refused to answer a certified question which would not have disposed of the action. *See In re Richards*, 223 A.2d 827, 833 (Me. 1966). The Supreme Court of Washington approved the use of certification over the objections of three of its justices who argued that it was unlawful under the state constitution. *In re Elliot*, 446 P.2d 347, 354 (Wash. 1968).

appeal, circuit courts and county courts.”<sup>325</sup>

## V. CONCLUSION

To paraphrase the Eleventh Circuit’s opinion in *Bonner v. City of Prichard*:<sup>326</sup>

The state and federal trial courts, the federal appellate courts, the bar and the public are entitled to a better result than to be cast adrift among the differing precedents of other districts, required to examine afresh every legal principle that eventually arises in the state. This approach is inconsistent with the virtually wholesale adoption in this country of English common law. A multi-district court sitting en banc would be an available forum for pursuit of a better rule and for rejection of any precedents that should be no longer followed.<sup>327</sup>

Moreover, the Supreme Court of Florida would be available, as it is today, to supervise the administration of justice in Florida.

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325. At the same time, any question about the constitutionality of intradistrict en banc decisions, as has been raised by some judges, could be settled by amending article V, section 4(a) (the third sentence) to read: “Three *or more* judges shall consider each case and the concurrence of *a majority* shall be necessary to a decision.” Intradistrict en banc consideration might still be desirable, for example, for cases of “exceptional importance.”

326. 661 F.2d at 1211.

327. The Eleventh Circuit’s version can be found *id.* at 1211.

## APPENDIX "A"

## STATE APPELLATE DISTRICTS

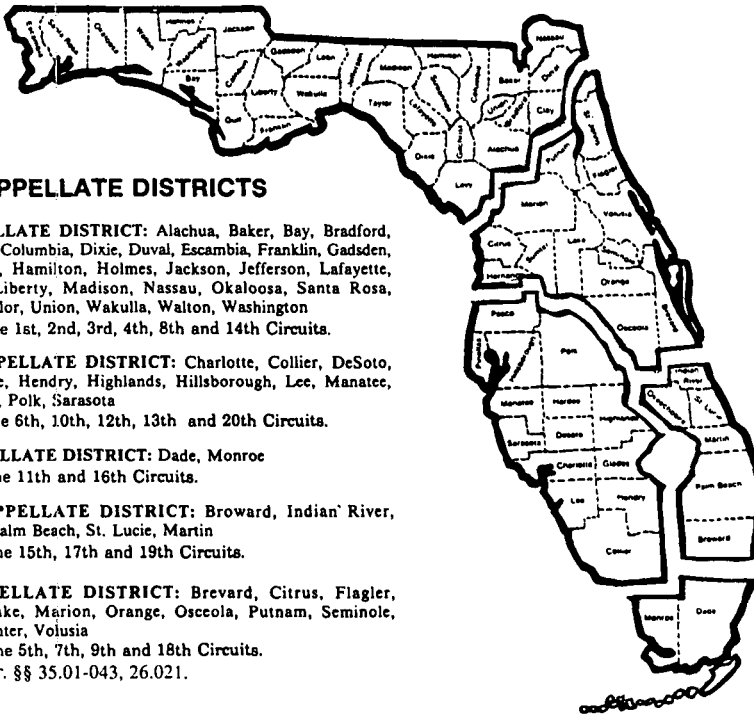
**FIRST APPELLATE DISTRICT:** Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, Washington  
Comprising the 1st, 2nd, 3rd, 4th, 8th and 14th Circuits.

**SECOND APPELLATE DISTRICT:** Charlotte, Collier, DeSoto, Glades, Hardee, Hendry, Highlands, Hillsborough, Lee, Manatee, Pasco, Pinellas, Polk, Sarasota  
Comprising the 6th, 10th, 12th, 13th and 20th Circuits.

**THIRD APPELLATE DISTRICT:** Dade, Monroe  
Comprising the 11th and 16th Circuits.

**FOURTH APPELLATE DISTRICT:** Broward, Indian River, Okeechobee, Palm Beach, St. Lucie, Martin  
Comprising the 15th, 17th and 19th Circuits.

**FIFTH APPELLATE DISTRICT:** Brevard, Citrus, Flagler, Hernando, Lake, Marion, Orange, Osceola, Putnam, Seminole, St. Johns, Sumter, Volusia  
Comprising the 5th, 7th, 9th and 18th Circuits.  
See FLA. STAT. §§ 35.01-043, 26.021.

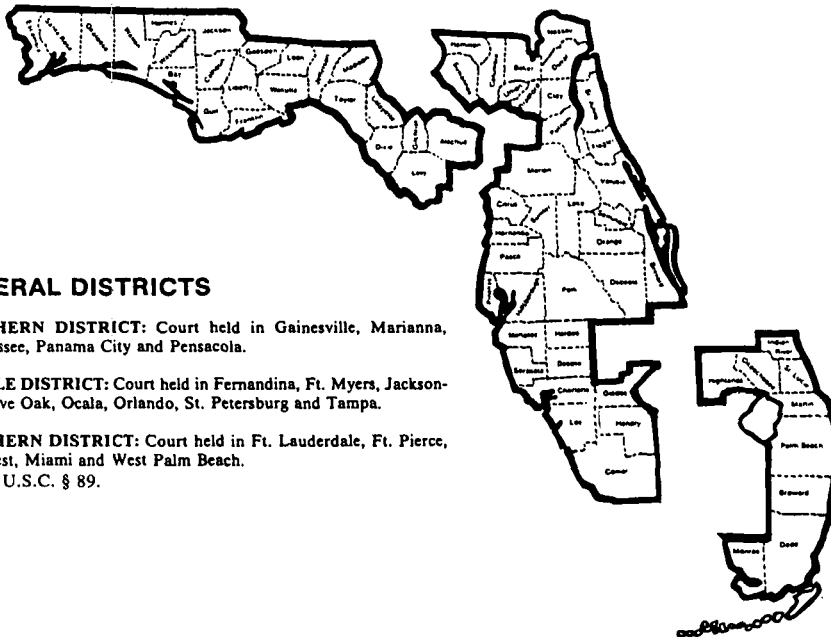


## FEDERAL DISTRICTS

**NORTHERN DISTRICT:** Court held in Gainesville, Marianna, Tallahassee, Panama City and Pensacola.

**MIDDLE DISTRICT:** Court held in Fernandina, Ft. Myers, Jacksonville, Live Oak, Ocala, Orlando, St. Petersburg and Tampa.

**SOUTHERN DISTRICT:** Court held in Ft. Lauderdale, Ft. Pierce, Key West, Miami and West Palm Beach.  
See 28 U.S.C. § 89.



## PART V

### LOCAL GOVERNMENT

*Although the Florida Constitution is most often thought of as a blueprint for the State government, many of its provisions actually deal with the running of local governments. Thus, in the fifth part of our Symposium we consider some of the ways that the Constitution affects county and municipal governments.*

*Professor Nancy Perkins Spyke begins by examining the often-combative relationship between the state and local governments over unfunded state mandates and the Constitution's attempt to mediate the problem. Next, Lauderhill Mayor Ilene S. Lieberman and Florida League of Cities General Counsel Harry Morrison, Jr. look at the current state of municipal home rule and the prospects for its future. Finally, practitioner Richard A. Sicking looks at the little-known provision in the Constitution that affects the funding of public pensions, including county and municipal pensions.*

# Florida's Constitutional Mandate Restrictions

Nancy Perkins Spyke\*

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## I. INTRODUCTION

"The bane of every budget director's existence is the rapid increase in unfunded state and federal mandates."<sup>1</sup> This statement reflects the widespread frustration felt by localities forced to comply with federal and state legislation that imposes duties on them without providing funding. The mandate era is thought to owe its existence to the Reagan/Bush administrations, whose aim was to lessen the federal government's responsibilities.<sup>2</sup>

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\* Professor Spyke is a Professor of Legal Writing at the Nova University Shepard Broad Law Center, where she teaches Florida Constitutional Law. During the 1993-94 academic year, she will be a Visiting Professor of Law at Duquesne Law School. She extends her thanks and appreciation to Craig Glasser, Nova University Shepard Broad Law Center 1994 J.D. candidate, for his invaluable assistance in the preparation of this article.

1. John R. Blinn, *When Cities Go Under*, MANHATTAN LAW., Dec. 1991, at 37.

2. William Tucker, *Rebellion Grows Against Federal Mandates*, PUB. FIN. WASH. WATCH, Feb. 1, 1993, at 4.

Congress, not sharing this view and eager to continue implementing social policy, engaged in cost shifting by enacting laws that passed the cost of program compliance along to state and local governments.<sup>3</sup>

At a time when the staggering cost of federal mandates has placed many a locality in a "financial straightjacket,"<sup>4</sup> state governments have only added to the load by enacting their own cost shifting legislation.<sup>5</sup> Florida is no exception. Between the years of 1981 and 1990, Florida's Legislature enacted 288 mandates, many of them unfunded.<sup>6</sup> These mandates required Florida's local governments to "manage growth, provide pension benefits, protect the environment, and otherwise take action to address various problems."<sup>7</sup> The 1988 state mandates alone were estimated to cost Florida's local governments close to \$39 million.<sup>8</sup> Responding to pressure from local governments to curtail the flood of mandate legislation, the Florida Legislature proposed an amendment to the state constitution that would restrict mandates. In 1990, the amendment received a favorable vote of the electorate and became section 18 of article VII of the Florida Constitution.<sup>9</sup>

Although the amendment's initial language excuses local governments from complying with state mandates,<sup>10</sup> other provisions within the amendment contain numerous exceptions and exemptions,<sup>11</sup> all the result of predictable compromises. Taken together, these exceptions and exemptions may not "swallow the rule," but they nevertheless take a few teeth out of local government's intended goals of the provision. In the three years since its enactment, the amendment appears to have had limited effect on curtailment of mandates. However, it has raised legislators' awareness of the problem that results from unfunded mandates, has given local governments

3. *Id.*

4. *Id.* In early 1993, the date of Mr. Tucker's article, the annual cost of federal mandates was estimated to be between \$3 and \$4 billion. *Id.*

5. *See id.*

6. Staff of Fla. H.R. Comm. on Comm'y Aff., CS/HJR 139, 140 (1989) Staff Analysis 2 (April 5, 1989) (on file with comm.) [hereinafter April 5 Staff Analysis].

7. *Id.*

8. *Id.*

9. FLA. CONST. art. VII, § 18. Throughout this article the amendment will be interchangeably referred to as "the amendment" and "section 18."

10. *See infra* text accompanying note 39.

11. "Exception" is used to refer to an item that is excused from the operation of the amendment, while "exemption" refers to an item that falls outside the scope of the amendment. *See BLACK'S LAW DICTIONARY* 559, 571 (6th ed. 1990). As will be shown, this may well be a distinction without a difference.

a stronger voice in the legislative process, and has helped local governments maintain existing funding. To a limited extent, section 18 has fulfilled its purpose, as expressed in the legislative history.<sup>12</sup> While local governments feel section 18 has not gone far enough, they nevertheless welcome it, and now see a need to push the Legislature to enact implementing legislation. Reasonable implementing legislation, coupled with a new generation of mandate-conscious legislators, should further help alleviate Florida's intergovernmental frictions.

## II. BACKGROUND

The amendment's legislative history exposes the extent of the mandate problem that existed at the end of the 1980's. The seemingly non-stop enactment of mandates by the Florida Legislature resulted in a deepening crisis with no apparent end in sight.<sup>13</sup> The problem had worsened despite action taken in the previous decade. In 1977, as a partial response to the taxpayers' revolt and the constitutional limitations on local governments' revenue structure, the Legislature created the Florida Advisory Council on Intergovernmental Relations (ACIR).<sup>14</sup> The legislative findings and purpose underlying the creation of ACIR acknowledged a need to study problems with the intergovernmental aspects of state finance and interstate relationships.<sup>15</sup> ACIR was required to examine proposed state programs and "assess their impact upon Florida and its political subdivisions . . ."<sup>16</sup> ACIR was also required to issue annual reports of its findings and recommendations, and analyze all new state programs or expansion of existing programs that increased the expenditure or lessened the revenue-producing ability of local governments.<sup>17</sup>

In 1978, legislation was passed requiring each bill that affected the financial condition of local governments to include an economic impact

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12. See *infra* text accompanying note 41.

13. See generally Kristin Conroy Rubin, *Unfunded Mandates: A Continuing Source of Intergovernmental Discord*, 17 FLA. ST. U. L. REV. 591, 592 (1990) (discussing intergovernmental relations in Florida). In 1988, for example, the Legislature enacted legislation expanding the number of people eligible to receive local government pension benefits. *Id.*

14. FLA. STAT. §§ 163.701-.708 (1991); see also April 5 Staff Analysis, *supra* note 6, at 1.

15. FLA. STAT. § 163.702 (1991).

16. *Id.* § 163.705(1)(d).

17. *Id.* § 163.705(1)(g), (3).



statement.<sup>18</sup> Accordingly, section 11.076 of the Florida Statutes reads as a strong directive, not only requiring economic impact statements for all state mandated legislation, but additionally requiring the state to provide funding to offset certain mandated program costs.<sup>19</sup> However, this facially helpful legislation was largely ignored by subsequent legislatures, who were not bound by the acts of their predecessors.<sup>20</sup> Therefore, even though the statute was not repealed, it provided no help to Florida counties and cities.

Statistics showed that the number of mandates was increasing. From 1981 to 1988, 288 mandates were enacted; forty-nine mandates were enacted in 1987; sixty-five mandates were enacted in 1988. In 1988 alone, the mandate price tag for local governments was \$38,976,100.<sup>21</sup> Despite the escalation, the number of mandates was not out of proportion to the number of general acts.<sup>22</sup> However, the numbers alone did not reflect the full extent of the problem. ACIR found, in its 1985 report, that bills including mandates received less scrutiny by the Legislature than other legislation.<sup>23</sup> Mandates were also enacted during the last three days of the legislative session,<sup>24</sup> further indicating the decreased level of attention given them. ACIR also found many of the bills did not set forth their cost to local government.<sup>25</sup>

The significance of the large number of mandates and the corresponding cost to local governments was heightened by existing constitutional restrictions on local governments. Under the Florida Constitution, the state has considerable control over local government.<sup>26</sup> Article VIII, section 1(a) of the constitution provides that counties can be "created, abolished or changed by law . . . ."<sup>27</sup> Similarly, Florida "municipalities may be established or abolished and their charters amended pursuant to general or special law."<sup>28</sup> Local governments have been given home rule power by

18. April 5 Staff Analysis, *supra* note 6, at 1; *see also* FLA. STAT. § 11.076 (1991).

19. FLA. STAT. § 11.076 (1991).

20. Rubin, *supra* note 13, at 598; *see also* April 5 Staff Analysis, *supra* note 6, at 2. For the Legislature to be bound, the mandate restriction had to appear in the state's constitution. Rubin, *supra* note 13, at 598.

21. April 5 Staff Analysis, *supra* note 6, at 2.

22. Staff of Fla. H.R. Comm. on Comm'y Aff., CS/CS/CS/CS/HJR 139, 140 (1989) Staff Analysis 2 (final June 2, 1989) (on file with comm.) [hereinafter Final Staff Analysis].

23. *Id.*

24. *Id.*

25. *Id.* at 3.

26. FLA. CONST. art VIII, § 1(a).

27. *Id.*

28. *Id.* § 2(a).

the Legislature,<sup>29</sup> but the Legislature still retains discretionary power over them.<sup>30</sup> This discretionary power allowed the Legislature to impose mandates as it saw fit.

This unrestrained mandate situation posed particular problems in light of limitations on local governments' revenue generating mechanisms. The Florida Constitution provides that "[n]o tax shall be levied except in pursuance of law."<sup>31</sup> Further, while the state cannot levy ad valorem taxes on real property, all other forms of taxation are preempted to the state unless otherwise provided by law.<sup>32</sup> Local governments are left to rely primarily on ad valorem taxes, service charges, and state-shared revenues for their funding<sup>33</sup> within the limits of the constitution.<sup>34</sup> Although counties and cities may have other lesser revenue sources, including utility service taxes and local option taxes, the state determines the extent of their taxing authority.<sup>35</sup>

Against this bleak fiscal backdrop, the 1989 Florida Legislature addressed the mandate problem. Relying on the 1985 ACIR Report, the Legislature considered five methods to address unfunded mandates: 1) a reimbursement program, requiring local governments to be paid for certain mandates; 2) a sunset provision, requiring local mandates to expire within a set time frame unless re-enacted; 3) a sunrise provision, requiring an extraordinary majority vote to enact unfunded mandates; 4) a monitoring mechanism, to identify and monitor mandate bills during the legislative process; and 5) a fiscal note protocol, to determine the impact of mandate legislation.<sup>36</sup> The final version of the amendment embraces, to an extent, all the alternatives except the sunset provision. An earlier proposal included both the sunset and sunrise alternatives, but gave way in committee to the provisions that were ultimately submitted to the voters.<sup>37</sup> The final joint resolution, replete with exemptions and special provisions, was finally adopted in 1990. However, it was not readily accepted by the Legislature.

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29. County and municipal home rule is authorized by chapters 125 and 166 of the Florida Statutes, respectively. *Id.*

30. Final Staff Analysis, *supra* note 22, at 2; *see also* City of Boca Raton v. State, 595 So. 2d 25, 28 (Fla. 1992).

31. FLA. CONST. art. VII, § 1(a).

32. *Id.*

33. Rubin, *supra* note 13, at 594.

34. *See, e.g.*, FLA. CONST. art. VII, § 9(b) (amended 1976) (limiting the millage rate for ad valorem taxation at the county and municipal level).

35. Rubin, *supra* note 13, at 594.

36. Final Staff Analysis, *supra* note 22, at 3.

37. Rubin, *supra* note 13, at 603-06.

A separate initiative petition that would have placed before the voters an amendment prohibiting local mandates altogether unless they were funded, proved to be the catalyst for legislative approval.<sup>38</sup>

### III. ARTICLE VII, SECTION 18

The mandate restriction amendment is composed of five subsections: subsection (a) sets forth the limitation on laws requiring local governments to spend money and provides for exceptions that will allow their passage; subsection (b) sets forth limits on laws that reduce local government authority to raise revenues; subsection (c) limits legislation that would reduce local governments' share of state taxes; subsection (d) sets forth the laws that are exempt from the first three subsections; and subsection (e) provides that the Legislature may enact implementing legislation.<sup>39</sup> For the

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38. Fla. H.R. Comm. on Approp., tape recording of proceedings (May 22, 1989) (on file with author) (comments of Rep. Bloom).

39. The amendment in its entirety reads as follows:

SECTION 18. Laws requiring counties or municipalities to spend funds or limiting their ability to raise revenue or receive state tax revenue.—

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.

(b) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.

(c) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the percentage of a

sake of clarity, this article's use of the word "exception" refers to those mandates allowed under subsection (a), and "exemption" refers to the laws that escape the reach of section 18, as listed in subsection (d).<sup>40</sup>

The Legislature's Final Staff Analysis for section 18 clearly sets forth its intent: "The intent of this proposed constitutional provision is to give local governments greater bargaining power on the subject of unfunded mandates and to protect existing local revenue sources."<sup>41</sup> Earlier versions of the proposed amendment were thought to go much further than the stated intent, and much of the language in the adopted amendment was aimed at preserving that intent.<sup>42</sup> This statement of intent is more restrictive than one which would indicate an intent to curtail unfunded mandates, which is what local governments likely desired.

Perhaps the statement of legislative purpose represents the greatest of all the compromises between local governments and the Legislature. It indicates that the Legislature was willing to present an amendment that would give local governments more of a voice in the legislative mandate process and assist them in maintaining funding. The Legislature recognized the amendment would "affect the legislature's ability to create, reorganize, and abolish programs" and "encourage greater cooperation between . . . all

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state tax shared with counties and municipalities as an aggregate on February 1, 1989. The provisions of this subsection shall not apply to enhancements enacted after February 1, 1989, to state tax sources, or during a fiscal emergency declared in a written joint proclamation issued by the president of the senate and the speaker of the house of representatives, or where the legislature provides additional state-shared revenues which are anticipated to be sufficient to replace the anticipated aggregate loss of state-shared revenues resulting from the reduction of the percentage of the state tax shared with counties and municipalities, which source of replacement revenues shall be subject to the same requirements for repeal or modification as provided herein for a state-shared tax source existing on February 1, 1989.

(d) Laws adopted to require funding of pension benefits existing on the effective date of this section, criminal laws, election laws, the general appropriations act, special appropriations acts, laws reauthorizing but not expanding then-existing statutory authority, laws having insignificant fiscal impact, and laws creating, modifying, or repealing noncriminal infractions, are exempt from the requirements of this section.

(e) The legislature may enact laws to assist in the implementation and enforcement of this section.

FLA. CONST. art. VII, § 18.

40. This follows legislative staff practice. See also *supra* note 11.

41. Final Staff Analysis, *supra* note 22, at 9.

42. *Id.* at 9-10.

levels of government.”<sup>43</sup> But nowhere does the legislative history indicate that the Legislature viewed the amendment as one that would significantly curtail its policy-implementing activity.<sup>44</sup> This point is important in assessing the success of section 18. A discussion of how the amendment was crafted to reflect that intent follows.

Subsection (a) deals with spending mandates, or those mandates that require local governments to spend money. Under its provisions, neither counties nor municipalities are bound by general laws that require them to spend funds unless the Legislature first determines that the law fulfills an important state interest.<sup>45</sup> In addition, the law must meet one of five requirements: the Legislature must appropriate funds for the mandate based on the estimated cost at the time of enactment; the Legislature must authorize the local government to enact a funding source to cover the estimated cost of the mandate; the mandate must be approved by two-thirds of the membership in each house of the Legislature; the mandate must be part of a law that applies to all persons similarly situated, including state and local governments; or the mandate must be necessary to comply with a federal requirement that contemplates local government involvement.<sup>46</sup> The subsection sets out a two-part test that must be met by mandates that require local government expenditures. All such mandates must fulfill an important state interest, and must additionally meet one of the five tests outlined above.<sup>47</sup>

Under this subsection, only local governments are given standing to challenge a mandate, and they are not further required to bring an action unless the State challenges them for noncompliance.<sup>48</sup> The limitation on standing prevents the courts from being otherwise flooded with challenges to general laws,<sup>49</sup> which was one of the concerns with earlier proposals.<sup>50</sup> It is both interesting, and perhaps significant, that the amendment does not begin with language expressly restricting the Legislature, such as, “Notwithstanding any other provision herein, the legislature shall not enact any law . . . .” Instead, the provision begins by stating that local governments are

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43. *Id.*

44. *See* FLA. CONST. art. VII, § 18(a).

45. *Id.*

46. *Id.*

47. *Id.*

48. Final Staff Analysis, *supra* note 22, at 5. Local governments are free to bring a declaratory judgment action as well. *Id.*

49. *Id.*

50. *Id.* at 10.

not bound by certain types of general laws.<sup>51</sup> The latter language reads less as a restriction on the Legislature than a right of local governments. Further, the wording of the provision could be read to place the burden on local governments to prove a mandate fails to comply with section 18, as opposed to having the Legislature prove a law passes muster.<sup>52</sup>

The legislative history makes clear that the first prong of the spending mandate's provision, requiring an important state interest, is to be based on a purely legislative determination, not on fact finding.<sup>53</sup> In practice, this prong has proved to be easily met and is seen as weakening the amendment.<sup>54</sup> How the courts will deal with "important state interest" when confronted with a challenge is unclear.<sup>55</sup> It is likely, however, that courts will tend to defer to the legislative determination.<sup>56</sup>

The alternative second prongs to the test in subsection (a) were also the subject of compromise. An earlier proposal was read to prohibit the Legislature, without a two-thirds membership vote, from passing laws pursuant to its police power if the laws affected local government. In response, the amendment's exception for laws that apply to "all persons similarly situated, including the state and local governments" was added.<sup>57</sup> This provision, if interpreted liberally, could allow numerous mandates to be enacted; indeed, it can be said that most laws apply to all similarly situated persons and entities.<sup>58</sup> Local governments view this provision as a troublesome loophole.<sup>59</sup>

There was also concern under an earlier amendment proposal that legislation could be invalidated even if funding was provided in separate legislation.<sup>60</sup> The staff analysis notes that the amendment, as adopted, allows the Legislature to appropriate funds without necessarily tying them

51. FLA. CONST. art VII, § 18(a).

52. *But see* Telephone Interview with Lynn Tipton, Executive Assistant for Intergovernmental Relations, Florida League of Cities (May 26, 1993).

53. Final Staff Analysis, *supra* note 22, at 5.

54. *See infra* text accompanying notes 195, 205.

55. Final Staff Analysis, *supra* note 22, at 11.

56. Florida courts have been extremely deferential to the Legislature in analogous situations. *See, e.g.,* Linscott v. Orange County Indus. Dev. Auth., 443 So. 2d 97 (Fla. 1983) (the Legislature's determination of public purpose must be clearly wrong to be beyond the power of the Legislature).

57. FLA. CONST. art. VII, § 18(a); *see also* Final Staff Analysis, *supra* note 22, at 10.

58. Laws failing to treat those similarly situated in the same manner may raise equal protection questions.

59. *See infra* text accompanying notes 209-12.

60. FLA. CONST. art. VII, § 18(a); *see also* Final Staff Analysis, *supra* note 22, at 10.

to the mandate.<sup>61</sup> Another feared problem was that local governments might later challenge funded mandates, claiming that the funding was inadequate. In response, the amendment reflects that a funded mandate will qualify as an exception under subsection (a) as long as the sufficiency of funding is reasonable at the time of enactment.<sup>62</sup> As such, there should be no danger of later rehearings.<sup>63</sup> Further, while prior proposals would have prohibited mandates that were enacted in response to federal mandates, or those enacted to enable the state to be eligible for federal entitlements, the final language in subsection (a) provided exceptions to avoid these results.<sup>64</sup>

One perceived ambiguity was not remedied before the amendment was adopted. Subsection (a)'s focus on laws "requiring . . . [a] county or municipality to spend funds"<sup>65</sup> could refer to laws that both directly and indirectly require local governments to spend money. This ambiguity may lead to challenges brought against laws, the indirect effects of which require the expenditure of funds. The legislative history acknowledges the ambiguity, and notes that the phrase will likely be subject to later interpretation.<sup>66</sup>

Much of the language in subsection (a) was tailored to keep the focus of the amendment limited to its purpose of giving local governments more bargaining power in the Legislature and helping them maintain current funding levels.<sup>67</sup> The history also reveals that many of subsection (a)'s provisions were added to preserve legislative autonomy.<sup>68</sup> Language in the following subsections was similarly designed with that purpose in mind.

Subsection (b)'s aim is to prevent the Legislature from reducing the revenue sources available to local governments in the aggregate.<sup>69</sup> Similarly, subsection (c) prevents the Legislature from passing laws that reduce the percentage of state tax shared with counties and municipalities

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61. Final Staff Analysis, *supra* note 22, at 10. The staff analysis suggests that the Legislature designate the use of the funds, however. *Id.*

62. FLA. CONST. art. VII, § 18(a); *see also* Final Staff Analysis, *supra* note 22, at 12.

63. Final Staff Analysis, *supra* note 22, at 12.

64. *See* FLA. CONST. art. VII, § 18(a).

65. *Id.*

66. Final Staff Analysis, *supra* note 22, at 11.

67. *Id.* at 9.

68. *See generally id.*

69. FLA. CONST. art. VII, § 18(b); *see also* Final Staff Analysis, *supra* note 22, at 4 (this provision is tied to aggregate revenue sources as of February 1, 1989).

as an aggregate.<sup>70</sup> Under both subsections, a vote of two-thirds of the membership of the Legislature is required for any such legislation to be valid.<sup>71</sup> The language specifically looks to the “anticipated” effect of legislation, making clear that the effect will be determined at the time of enactment.<sup>72</sup> This language, as in the case of subsection (a)’s funding provision, seeks to limit future challenges based on inaccurate predictions.<sup>73</sup>

The use of the word “aggregate” is also significant, since it “clarifies that estimates will be made on the basis of the effect on all local governments grouped together, not on the basis of the effect on one municipality or county.”<sup>74</sup> The existing language appears to allow the passage of laws that would decrease either the revenue raising authority or state-shared revenues in a small number of counties, while at the same time increasing funds in others. As long as the aggregate revenue-raising authority or the percentage of state-shared tax revenues remained the same under the law, the law would be permissible with a simple majority vote.<sup>75</sup> Only if the law reduced the aggregate revenue raising authority or state revenue sharing percentage would a two-thirds vote be required.<sup>76</sup>

Earlier versions of the amendment had raised concerns that the Legislature could be prevented from restructuring local government funding and duties, even where the net result would be a zero decrease in funds.<sup>77</sup> Accordingly, the language in subsections (b) and (c) makes it clear that existing local government revenue sources and state-shared funds are not sacred; it is only the aggregate funds that are to be preserved.<sup>78</sup> It is interesting that the final staff analysis for the joint resolution notes that a two-thirds vote “would allow any restructuring.”<sup>79</sup> This language suggests that a super-majority vote would be needed to enact a law restructuring local government revenue sharing, even where the net effect was zero. As discussed above, a literal reading of the amendment’s language suggests that such a law would not be considered a mandate under the amendment. It is

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70. FLA. CONST. art. VII, § 18(c); *see also* Final Staff Analysis, *supra* note 22, at 4 (February 1, 1989, is also the pertinent date for this provision).

71. FLA. CONST. art. VII, §§ 18(a), 18(c).

72. Final Staff Analysis, *supra* note 22, at 6.

73. *Id.*

74. *Id.* at 11.

75. *See* FLA. CONST. art. VII, § 18(c).

76. *See id.*

77. Final Staff Analysis, *supra* note 22, at 11.

78. *Id.* at 12.

79. *Id.* at 11.



also noteworthy that subsection (c) places limits only on those laws reducing the percentage, rather than the amount, of state tax shared with local governments. Therefore, the Legislature is arguably free to pass laws liberalizing state tax exemptions that would reduce revenues, but that would keep existing percentages intact.<sup>80</sup>

Subsection (c) additionally includes a number of exceptions which permit the enactment of laws reducing state-shared tax revenues without a two-thirds vote.<sup>81</sup> These exceptions include, but are not limited to, laws enacted during a fiscal emergency, and situations "where the legislature provides additional state-shared revenues which are anticipated to be sufficient to replace the anticipated aggregate loss of state-shared revenues."<sup>82</sup>

To pass a provision under either subsection (b) or (c), a two-thirds vote is required.<sup>83</sup> The two-thirds vote is based on the membership of both houses, rather than being based on those voting.<sup>84</sup> Since the Florida Senate has forty members and the House has 120 members, votes of twenty-seven and eighty would be required to meet the two-thirds vote in each house, respectively. Although this may seem to be a difficult hurdle to overcome, such a super-majority vote is not uncommon.<sup>85</sup>

Yet another indication of compromise can be seen in subsection (d), which lists those laws that are exempt from the amendment's requirements. Exempt laws include those requiring "funding of pension benefits . . . criminal laws, election laws, the general appropriations act, special appropriations acts, laws reauthorizing but not expanding . . . existing statutory authority, laws having insignificant fiscal impact, and laws creating, modifying, or repealing noncriminal infractions . . . ."<sup>86</sup> Under an earlier proposal it appeared that the mandate restrictions could prevent the passage of appropriations acts,<sup>87</sup> which accounts for its inclusion as an exemption.

Legislators additionally felt that the amendment needed a dollar threshold to trigger the mandate restrictions, without which lawsuits would

80. *See id.* However, 1992 legislation provided for several sales tax exemptions and gave the Legislature full mandate review. They were generally determined to be exempt under the "insignificant fiscal impact" exemption. *See infra* text accompanying note 150.

81. FLA. CONST. art. VII, § 18(c).

82. *Id.*

83. *Id.*

84. Final Staff Analysis, *supra* note 22, at 7.

85. *See infra* text accompanying note 213.

86. FLA. CONST. art. VII, § 18(d).

87. Final Staff Analysis, *supra* note 22, at 13.

flourish.<sup>88</sup> Accordingly, the “insignificant fiscal impact” exemption was included, which lessened the load on legislative staff, since it removed the requirement of preparing fiscal analyses on bills with low price tags.<sup>89</sup> The exemption for laws having an insignificant impact could also prevent general laws coming within the provisions of the amendment if they have only an indirect effect on local government funding.<sup>90</sup> This exemption has been relied upon to enact numerous mandates, due largely in part to the Legislature’s calculation of insignificant fiscal impact.<sup>91</sup>

Finally, subsection (e) allows the Legislature to enact implementing legislation.<sup>92</sup> This provision allows the Legislature to define pertinent terms of the amendment, and also allows statutes to set venue for a challenge under the amendment.<sup>93</sup> Terms that would hopefully be defined in such legislation include “insignificant fiscal impact” and “criminal laws.”

When read against the background of intense anti-mandate sentiment existing at the end of the 1980’s, section 18 appears to be a weapon that was largely dismantled by its own provisions. Local government’s intended purpose of the amendment would have simply been to stop unfunded state mandates. However, the amendment must be read in light of its limited legislative purpose of protecting existing local government revenues and giving localities greater bargaining power in the Legislature.<sup>94</sup> Bearing that intent in mind, the amendment, on its face, appears useful. However, a review of legislative activity in the sessions following the amendment’s adoption, as well as consideration of the current perceptions of counties and cities, indicates that the amendment does not fully succeed, even based on its restricted purposes.

#### IV. ACIR’S RESPONSE

In fulfilling its statutory duties pursuant to section 163.705(3) of the Florida Statutes, ACIR prepared a detailed report in 1991 to inform the Governor and the Legislature about the status of the state mandates imposed

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88. *Id.* at 10-11.

89. *Id.*

90. *Id.* at 11. Laws can indirectly impact local governments by causing them to spend money to promulgate ordinances, or by causing them to use outside counsel more often. *Id.* But see *supra* text accompanying note 66.

91. See *infra* note 115 and accompanying text.

92. FLA. CONST. art. VII, § 18(e).

93. Final Staff Analysis, *supra* note 22, at 7.

94. *Id.* at 9.

on Florida's local governments in the 1991 legislative session.<sup>95</sup> This report was supplemented in both 1992 and 1993 to provide information about the state mandates imposed by the Legislature in those years.<sup>96</sup> These reports provide valuable and comprehensive information regarding mandate legislation passed since the adoption of section 18.<sup>97</sup> After initially suggesting a decrease in mandate activity, the reports reveal that mandate legislation has continued to be enacted, much of it falling within the amendment's exceptions and exemptions.<sup>98</sup>

For the purposes of its reporting activities, ACIR has defined "mandate" to comply with the definition it sees as implicit in section 18.<sup>99</sup> This includes laws that, previous to the amendment's passage, would not have been considered mandates, such as laws that applied proportionately to both the private and public sector,<sup>100</sup> laws applicable to a single jurisdiction, and laws that were optional or impacted non-mandated responsibilities.<sup>101</sup> Mandate reporting under section 18 has led ACIR to be more inclusive in the laws it examines. It may be, however, that legislative staff occasionally interprets "mandate" differently. This is evidenced by laws that appear as mandates in ACIR's post-1990 reports that were never given mandate consideration by legislative staff.<sup>102</sup>

To further help legislative staff make its determinations under the amendment, ACIR has established the ACIR/Local Government Facsimile Network, which allows local governments to provide input regarding mandate legislation.<sup>103</sup> Known as FAXNET, this tool enables ACIR to contact thirty-eight counties and fifty-five cities to acquire reliable information regarding proposed mandate legislation.<sup>104</sup> Legislative staff,

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95. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1991 REPORT ON MANDATES AND MEASURES AFFECTING LOCAL GOVERNMENT FISCAL CAPACITY, Sept. 1991, 91-3, at i. [hereinafter 1991 REPORT] (providing a fairly detailed background of the mandate problem, and also devoting a section to mandate restrictions and reimbursement programs in other states).

96. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1992 SUPPLEMENT TO THE 1991 REPORT ON MANDATES AND MEASURES AFFECTING LOCAL GOVERNMENT FISCAL CAPACITY, Oct. 1992, at 3. [hereinafter 1992 REPORT].

97. *See generally id.*

98. *Id.*

99. *Id.* at 5.

100. Here, ACIR uses the example of Workers' Compensation benefits. *Id.* at 5.

101. 1992 REPORT, *supra* note 96, at 5.

102. *See infra* text accompanying notes 157-59.

103. 1991 REPORT, *supra* note 95, at 28.

104. *Id.*

local government officials, and ACIR personnel may initiate a FAXNET transmission, to which local governments typically respond within forty-eight hours.<sup>105</sup>

## V. LEGISLATIVE STAFF PROCEDURES

The leadership of the 1991 House and Senate developed policies to review proposed legislation for mandate issues. The ACIR Report describes the early activity as follows:

Substantive committee staff were charged to provide initial review of proposed legislation for mandates on counties and municipalities. Each chamber designated a committee or ad hoc group to assist committee staff in screening pre-filed bills. These same entities were responsible to monitor [sic] amended bills for mandates. In the Senate, the Committee on Community Affairs assumed this task, with assistance from the Finance, Taxation, and Claims Committee and staff from the Executive Office of the Senate. In the House of Representatives, the Finance & Taxation and Appropriations Committees, together with staff from the Speaker's Office, were given this responsibility.<sup>106</sup>

Fiscal notes are prepared by staff members of those committees considering the legislation. Depending on the status of the legislation under section 18, the Speaker or the Senate President is notified so that the proper action can be taken on the bill.<sup>107</sup>

It was also important to the Legislature that staff members uniformly interpret the provisions of the amendment. In response to that concern, a "3-8-3: Local Mandate Analysis Procedure" was developed.<sup>108</sup> The procedure institutes a flow-chart approach to be used with proposed legislation.<sup>109</sup> Under this approach, each bill is initially reviewed to determine if it can be classified as one of three types of bills: 1) a general bill requiring local governments to spend money or take action requiring the expenditure of money; 2) a general bill anticipated to reduce local government authority to raise aggregate revenue; or 3) a general bill reducing the aggregate local government percentage share of state-shared revenue. If the

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105. *Id.*

106. *Id.* at 22.

107. *Id.*

108. 1991 REPORT, *supra* note 95, at 22-24.

109. *Id.* at 23.

bill can be classified as one of these three types of bills, staff must then determine if any of subsection (d)'s eight exemptions apply. The exemptions include: bills funding previous pension benefits, criminal laws, election laws, general appropriations bills, special appropriations bills, bills re-authorizing existing statutory authority, bills having insignificant fiscal impact, and bills establishing non-criminal infractions. If any one of the eight exemptions apply, the bill is deemed exempt.<sup>110</sup>

Any bill that cannot be classified as exempt must meet requirements that depend on which of the three original classifications apply. If the bill requires the expenditure of money by local governments, the Legislature must formally determine the bill serves an important state interest, and additionally, one of four requirements must be met: 1) estimated funding must be provided; 2) a local funding source must be provided; 3) the bill must require compliance by similarly situated persons; or 4) the bill must be required to comply with a federal mandate. If none of these exceptions apply, the bill must receive a vote of two-thirds of the membership of each house in addition to serving an important state interest.<sup>111</sup>

If the bill reduces the fund raising authority of local governments, there are no substantive exceptions, and the bill must pass with the two-thirds super-majority vote. If the bill reduces local governments' percentage share of state-shared revenues, the bill can be excepted from the mandate restrictions if it provides for enhancements to state tax sources, if there is a proclaimed state fiscal emergency, or if a revenue replacement source is included in the bill. If none of these exceptions apply, a two-thirds vote is required.<sup>112</sup>

The "3-8-3" legislative approach reformats the amendment's provisions into a uniform paradigm for staff members. Bills are first considered to see if they fall within one of the three types of mandates; they are then considered to determine if they fall within one of the eight exemptions to the amendment; if not, the three mandate classifications are then reconsidered to ensure compliance under the amendment.

Legislative guidelines from the 1991 session also reveal the Legislature's interpretation of some of the amendment's terms. For example, exempt criminal laws are interpreted by the guidelines to include laws that define the type of behavior that will subject persons to arrest and criminal sanction, as well as laws related to arrest and pre-trial detention.<sup>113</sup>

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110. *Id.*

111. *Id.*

112. *Id.*

113. 1991 REPORT, *supra* note 95, at 24.

Additionally, laws will be considered exempt under the criminal law exemption if they relate to defense and prosecution or deal with adjudication, sentencing, and implementation of criminal sanctions.<sup>114</sup> "Insignificant fiscal impact" was defined to be any amount less than \$1.4 million for 1991-92, an amount equal to ten cents or less per capita per year.<sup>115</sup>

Staff analyses, the uniform legislative history document in Florida, now devote an entire section to municipal and county mandate restrictions. The section typically appears as Section III, following the Bill Summary (Section I), and the Economic Impact and Fiscal Note section (Section II).<sup>116</sup> Staff first identifies whether the bill under analysis will require the expenditure of funds by local governments, and then addresses whether any exemptions or exceptions apply. If an accurate measure of costs to local governments cannot be determined, the notes will explain which other exemptions or exceptions may be applicable.<sup>117</sup>

## VI. THE 1991 LEGISLATIVE SESSION

### A. *Mandate Legislation*

During the 1991 legislative session, fourteen mandate bills were

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114. *Id.* This has been interpreted liberally by legislative staff in at least one instance. See *infra* text accompanying note 151.

115. 1991 REPORT, *supra* note 95, at 24.

116. Miscellaneous staff analyses in author's files.

117. By way of example, the following appears under the Mandates Restrictions section in a 1993 Staff Analysis for a bill aimed at streamlining the environmental permitting process:

As noted above, affected counties and municipalities will incur costs related to reviewing applications to determine consistency with local comprehensive plans and land use regulations. While the act provides for reimbursement of such costs to affected reviewing agencies, such reimbursement funds must be shared with state and regional agencies involved in the review process. If there are insufficient funds to completely reimburse all reviewing agencies, the funds are prorated. Thus, there may be instance in which counties and municipalities will be required to expend funds (for which reimbursement would not be provided) in order to comply with this act. Because the amount of any such reimbursed costs cannot readily be determined at this time, the bill may need to include a finding of important state interest and be enacted by a vote of 2/3 of the membership of each house in order to comply with article VII, section 18 (a), Florida Constitution.

Staff of Fla. S. Comm. on Comm'y Aff., CS/CS/SB 1606 (1993) Staff Analysis 5-6 (March 16, 1993) (on file with comm.).

enacted.<sup>118</sup> Most of the mandates (eleven of the fourteen bills) required local governments to either create new services or expand existing ones. The balance of the bills reduced the revenue-generating authority of local governments.<sup>119</sup> The mandate total represented a sharp decrease in the mandate levels of the immediately preceding years.<sup>120</sup> Interestingly, all of the fourteen mandates were determined to be either exempt under subsection (d) of section 18, or excepted under subsection (a).<sup>121</sup>

Thirteen of the fourteen mandate bills were exempt because they were determined to have an insignificant fiscal impact.<sup>122</sup> Those mandates touched on many areas, demonstrating the far reach of section 18. The laws dealt with many subjects, including building permits, taxation, transportation corridors, community development, and health care. In the area of health care, a law was passed increasing the Medicaid reimbursement for out-of-county indigent medical expenses from 80 to 100 percent. A community development law was passed that expanded the information required on the annual reports of local governments with enterprise zones.<sup>123</sup> A law expanding the notice statement on building permits was also included as a mandate.<sup>124</sup> Those mandates that represented revenue reduction measures included a law that broadened the classification of educational property for the purposes of an ad valorem tax exemption. Another law established a maximum amount for the total charges and fees that could be imposed on a party who initiates civil or appellate proceedings in circuit and county courts.<sup>125</sup>

The fourteenth bill passed in response to a federal requirement, and thus enjoyed an exception under the amendment. This bill required the Department of Community Affairs to ensure that energy assessments are conducted before a residence is weatherized.<sup>126</sup> Since this bill qualified for an exception under subsection (a), it also required a finding that it would fulfill an important state interest. However, the ACIR Report is silent as to

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118. 1991 REPORT, *supra* note 95, at 31.

119. *Id.*

120. *Id.* at 27.

121. *Id.* at 31. The ACIR 1991 Report notes that the 1991 session also resulted in the passage of revenue generating legislation which, to some extent, helped offset the impact of the new mandates. *Id.*

122. 1991 REPORT, *supra* note 95, at 32-34.

123. *Id.* at 33.

124. *Id.* at 32.

125. *Id.* at 32-33.

126. *Id.* at 33.

whether that finding was ever made.<sup>127</sup>

The 1991 Legislature also passed a number of bills expanding local government revenue sources. While a number of these bills were deemed to have an insignificant impact on the state, other programs represented substantial funds for local governments. One bill amended the sales tax statute to authorize an additional \$5.5 million in sales tax revenue for cities and counties.<sup>128</sup> Additional sales tax revenue was authorized for those local governments with professional sports facilities or new spring training facilities.<sup>129</sup> Laws also allocated funds to local governments to help them prepare their comprehensive plans.<sup>130</sup>

The 1991 mandate legislation demonstrates how broadly section 18 touches on the legislative process. For example, one might be surprised to find that bills dealing with the notice provisions of building permits would require review under the amendment. The same might also be said of the law requiring additional information on local government annual reports. The seemingly innocuous laws that were tracked by legislative staff, suggests that the Legislature had a heightened awareness of the cost of laws as they were considered, even though virtually all of the laws passed because their fiscal impact was determined to be insignificant.

ACIR's 1991 Report also provides a list of selected mandates that were not passed in that session. While one might think that their failure was due to the cost of the measures, some of the ill-fated mandates had been previously determined to be excepted by the "all persons similarly situated" language in the amendment.<sup>131</sup> A look at those bills is telling. One proposed bill deemed to affect all persons similarly situated dealt with eminent domain, requiring governments to pay cash compensation to billboard owners for the removal of billboards in certain situations.<sup>132</sup> Another proposed bill thought to qualify for the "similarly situated" exception, granted law enforcement employees the same disability benefits as fire fighters.<sup>133</sup> The bills would have unquestionably required local governments to spend significant amounts of money. The bills' broad-based police power character, however, would have allowed their passage under section 18, as long as they were also found to fulfill important state

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127. 1991 REPORT, *supra* note 95, at 33.

128. *Id.* at 35.

129. *Id.* at 36.

130. *Id.* at 35.

131. *Id.* at 38.

132. 1991 REPORT, *supra* note 95, at 38.

133. *Id.*



interests.

### B. *Implementing Legislation*

Pursuant to subsection (e) of the amendment, the 1991 Legislature passed implementing legislation that was vetoed by Governor Chiles.<sup>134</sup> The bill gave direction to any city or county choosing not to comply with a law that was allegedly violative of the amendment, and further established venue for such a challenge. The bill also defined "insignificant fiscal impact."

Under the bill, known as Senate Bill 2000,<sup>135</sup> a local government that refused to comply with mandate legislation first had to pass an ordinance declaring that the mandate violated article VII, section 18, and that the local government was not bound by the mandate.<sup>136</sup> Within ten days, a certified copy of the ordinance was to be filed with the Secretary of State, who would immediately notify the Governor, the Attorney General, the President of the Senate, and the Speaker of the House.<sup>137</sup> Within thirty days after receiving notice of the ordinance, the Attorney General would file a petition for a writ of mandamus to compel the local government's compliance with the law; however, if the Attorney General determined that the law on its face failed to meet the amendment's requirements, he or she could decide not to file the petition for mandamus, and would then have to notify the Governor, the President of the Senate, and the Speaker of the House, of that decision.<sup>138</sup> Venue for the action was placed in the county in which the district court of appeal, having jurisdiction over the county or municipality, was located. All appeals were to be at the First District Court of Appeal.<sup>139</sup> Finally, the implementing legislation defined "insignificant fiscal impact" similarly to the definition in the Legislature's guidelines: "an amount not greater than the product of the average statewide population for the applicable state fiscal year . . . multiplied by ten cents."<sup>140</sup>

The Governor found a number of problems with the bill and addressed them in his veto message. First, he underscored the intent of the mandate amendment which, in his view, was "to discourage the Legislature's

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134. Governor's Veto Message of S.B. 2000, *reprinted in* 2 FLA. S. JOUR. 10 (Spec. Sess. C 1991); *see also* 1991 REPORT, *supra* note 95, at 24.

135. S.B. 2000, *reprinted in* 1 FLA. S. JOUR. 132 (Reg. Sess. 1991).

136. *Id.*; *see also* 1991 REPORT, *supra* note 95, at 26.

137. Fla. SB 2000 (1991).

138. *Id.*

139. *Id.*

140. *Id.*

historical practice of reaping the benefit derived from enacting politically popular programs without facing the responsibility of funding the programs.”<sup>141</sup> The amendment, therefore, represents a strong restriction on the Legislature’s authority to pass mandates, and should not be interpreted to frustrate the will of the electorate, who had passed the amendment by a wide margin.<sup>142</sup> It is notable that the governor’s opinion of section 18’s purpose is more expansive and local government-friendly than the stated purpose of the amendment.

The veto message singled out a number of the bill’s provisions. For example, the Legislature’s definition of “insignificant fiscal impact,” an amount not greater than \$1.4 million, seemed too high, especially when compared to the amount used in the parallel provision applicable to the general appropriations process. That provision defines “insignificant fiscal impact” as an amount not greater than \$50,000.<sup>143</sup> The Governor was also concerned that the legislation placed an enormous burden on any local government that chose to challenge a mandate, since it was required to pass an ordinance and notify the Attorney General of its decision. Further, since the Attorney General was given very little discretion in deciding whether to seek mandamus, the legislation, in effect, forced local governments to spend “sorely needed” revenues to fund mandate challenges.<sup>144</sup> Governor Chiles suggested that ACIR become involved in the implementing legislation process, since it was charged to deal with intergovernmental relations.<sup>145</sup> The Governor’s veto put an end to Senate Bill 2000, and, in the intervening two legislative sessions, there has been no proposal for implementing legislation that has proceeded past the committee hearing stage.

## VII. THE 1992 LEGISLATIVE SESSION

### A. *Mandate Legislation*

The number of legislative enactments increased dramatically in 1992. Thirty-two laws, including fifty-two local government mandates,

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141. Governor’s Veto Message of SB 2000, *reprinted in* 2 FLA. S. JOUR. 10 (Spec. Sess. C 1991); *see also* 1991 REPORT, *supra* note 95, at 24.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

were enacted.<sup>146</sup> Of those laws, many were either exempt from the requirements of section 18 or enjoyed one of the exceptions.<sup>147</sup> Most of the laws were found either to have an insignificant fiscal impact, or met the "important state interest" test and were also funded, affected all persons similarly situated, or passed by the needed two-thirds vote.<sup>148</sup>

Laws determined to be exempt because of their insignificant fiscal impact included, among others, laws increasing emergency medical service license and certificate fees, and laws requiring simultaneous implementation of Unemployment Compensation Law amendments.<sup>149</sup> Other laws that passed by virtue of the insignificant fiscal impact exemption provided sales tax exemptions. For example, laws were passed exempting non-profit organizations from paying sales tax on equipment for pollution discharge cleanup; exempting educational institutions from paying sales tax on works of art; exempting the purchase of feed for ostriches from the sales tax; exempting out-of-state publishers from sales and corporate income taxes in certain situations; exempting Coast Guard auxiliary purchases from the sales tax; and exempting non-profit community cemetery purchases from the sales tax.<sup>150</sup> The laws were identified as reducing the tax base or the sales tax itself. While not clear, the staff apparently felt that the laws represented potential mandate problems under subsection (c), the provision limiting mandates that "reduce the percentage of state tax shared with counties and municipalities as an aggregate . . . ." However, these sales tax exemptions arguably decreased only the total amount of sales tax collected and did not alter the percentage share of the state tax revenue. If this is so, these laws were not mandates. Nevertheless, they were treated as such by legislative staff.

One law enjoyed the criminal law exemption; it imposed a new administrative requirement on law enforcement agencies that seize property under the Florida Contraband Forfeiture Act. It also provided for penalties for noncompliance.<sup>151</sup> Legislative staff determined this law qualified for the criminal law exemption, despite the fact that it was described as an administrative provision.

A number of the 1992 bills enjoyed exceptions under the amendment after first being found to fulfill important state interests. Only one was

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146. 1992 REPORT, *supra* note 96, at 7.

147. *Id.*

148. *Id.*

149. *Id.* at 8, 10.

150. *Id.* at 9-10.

151. 1992 REPORT, *supra* note 96, at 9-10.

excepted because offsetting fees were authorized. That law created a new service that required requiring that federal liens on real property to be filed with the circuit courts rather than the federal district courts.<sup>152</sup> Another law removed a statutory prohibition against including salary incentive pay in the calculation of police retirement benefits.<sup>153</sup> It passed by a two-thirds vote.<sup>154</sup> The subject of a third law, declared to deal with an important state interest, was "potty parity."<sup>155</sup> Under its provisions, newly constructed public or private buildings with public rest rooms must provide a specified ratio of water closets and urinals. This law passed muster since it affected all persons similarly situated.<sup>156</sup>

The 1992 Report is less enlightening in its treatment of a number of other mandates. Eight of the laws enacted during that session were found to raise mandate concerns but were amended in the House or Senate chamber, so there was no accessible documentation as to the applicability of section 18.<sup>157</sup> Fourteen laws were found to contain mandate provisions under the ACIR definition,<sup>158</sup> but the legislative staff failed to conclusively address the problem in the staff analysis. In ACIR's opinion, this could mean that the staff felt either an exemption or exception applied; alternatively, staff may have determined that section 18 was inapplicable.<sup>159</sup> This could indicate a discrepancy between ACIR's mandate definition and that used by legislative staff.

As in the case of the 1991 session, the 1992 session enacted various laws that provided new or expanded revenue sources for local governments. The fiscal impact of the vast majority of these provisions could not be determined.<sup>160</sup> However, a law increasing the cost of documentary stamps translated into an additional \$18.8 million for cities and counties.<sup>161</sup> However, these funds were earmarked for state and local affordable housing programs<sup>162</sup> rather than being freely available to local governments. A law that implemented a state-wide tax amnesty program was determined to

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152. *Id.* at 8.

153. *Id.* at 9.

154. *Id.*

155. *Id.* at 8.

156. 1992 REPORT, *supra* note 96, at 8.

157. *Id.* at 8-11.

158. See *supra* text accompanying notes 99-101.

159. 1992 REPORT, *supra* note 96, at 11.

160. *Id.* at 13-14.

161. *Id.* at 14.

162. *Id.*

yield local governments \$3 million in 1992-93 and \$8.1 million in 1993-94.<sup>163</sup> A law imposing additional fees for child support payments was determined to benefit county clerks of court in the amount of \$1.1 million.<sup>164</sup> Again, even though ACIR describes this law as one generating extra funds for local governments, the new revenue would only benefit clerks of court, rather than local governments in general.<sup>165</sup>

Local governments were also given some leeway in how they handle financial matters. Specifically, laws were passed allowing local governments to use certain tax revenues for expanded purposes.<sup>166</sup> For example, tourist development tax revenues were authorized to be used for museums.<sup>167</sup> Small counties were aided by a law allowing them to use local government infrastructure surtax revenues for operating purposes.<sup>168</sup> New legislation also authorized small counties to use the local option gas tax on motor and special fuel to pay for infrastructure projects.<sup>169</sup>

### B. *Implementing Legislation*

In response to Governor Chiles' veto of the 1991 implementing legislation, the House of Representatives Finance and Taxation Committee sought input from local government representatives and again introduced similar legislation.<sup>170</sup>

Although not enacted into law, the proposed legislation is interesting in how it differed from the 1991 attempt. Once again, the bill required a local government to document its determination that a mandate failed to meet the requirements of section 18 and, therefore, the county or city was not bound by the law. The Attorney General, as in the case of the earlier bill, was given the opportunity to seek a writ of mandamus, and venue was set in the circuit court having jurisdiction over the county or municipality.<sup>171</sup> The 1992 attempt differed most significantly from the 1991 version in its definition of "insignificant fiscal impact." The 1992 bill contained

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163. *Id.*

164. 1992 REPORT, *supra* note 96, at 14.

165. *Id.*

166. *Id.* at 18.

167. *Id.*

168. *Id.* Small counties include those with populations of 50,000 or less as of April 1, 1992. Use of the tax money would be subject to conditions. 1992 REPORT, *supra* note 96, at 18.

169. *Id.*

170. *Id.* at 19.

171. *Id.* at 19-20.

two detailed subsections devoted to the definition.<sup>172</sup>

Under the proposed definition, “insignificant fiscal impact” depended on the population of the affected local governments. The general definition provided that if a mandate affected either counties or municipalities, “insignificant fiscal impact” would respectively equal the product of five cents and the total statewide population or statewide municipal population.<sup>173</sup> If a mandate affected both counties and cities, “insignificant fiscal impact” would be tied to the total of the statewide municipal population and the statewide population.<sup>174</sup> However, under additional provisions of the proposed legislation, the “insignificant fiscal impact” threshold would apparently decrease if the mandate targeted less populated cities and counties.<sup>175</sup> Under this population adjustment formula, the “insignificant

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172. Section (2) of the proposed legislation is the relevant provision. It provided:

Section 2. (1) As used in subsection (d) of section 18 of Article VII of the Florida Constitution, “insignificant fiscal impact” means an amount less than:

(a) The product of multiplying by 5 cents the total statewide municipal population, for mandates affecting only municipalities;

(b) The product of multiplying by 5 cents the total statewide population, for mandates affecting only counties; or

(c) The sum of the amounts derived under paragraphs (a) and (b), for mandates affecting municipalities and counties.

(2) Adjustments to insignificant fiscal impact shall be made as follows:

(a) If a mandate affecting only municipalities applies solely to municipalities that have a combined total population of less than 50 percent of the total statewide municipal population, insignificant fiscal impact means an amount less than the product of multiplying by 10 cents the sum of the populations of the affected municipalities.

(b) If a mandate affecting only counties applies solely to counties that have a combined total population of less than 50 percent of the total statewide population, insignificant fiscal impact means an amount less than the product of multiplying by 10 cents the sum of the populations in the affected counties.

(c) If a mandate affecting counties and municipalities applies solely to counties and municipalities that have a combined total population of less than 50 percent of the sum of the total statewide municipal population and the total statewide population, insignificant fiscal impact means an amount less than the product of multiplying by 10 cents the sum of the populations in the affected municipalities and in the affected counties.

(3) For the purposes of this section, “population” means the latest population estimates determined by the Demographic Estimating Conference pursuant to s. 216.136, Florida Statutes, for the applicable state fiscal year.

*Id.* at 20.

173. 1992 REPORT, *supra* note 96, at 19-20.

174. *Id.* at 20.

175. *Id.*

fiscal impact" exemption would be harder to meet where the affected local governments were sparsely populated, since the dollar amount threshold would be tied to their population, rather than to the population on a state-wide basis. In any event, the general formula is notable since it used a five cent multiple rather than the Legislature's ten cent figure. This adjustable exemption was likely the result of lobbying by local government representatives, since its effect would have been to remove the "insignificant fiscal impact" exemption in certain instances. As previously mentioned, this proposed legislation was not enacted.

## VIII. THE 1993 LEGISLATIVE SESSION

### A. *Mandate Legislation*

In 1993, mandate legislation reached a post-amendment high. Forty-five laws were enacted that contained a total of eighty mandate provisions.<sup>176</sup> As were the majority of the 1992 mandates, most of the 1993 mandate provisions were classified as either exempt or excepted under the amendment's language.

Sixteen of the exempt mandates were determined to have insignificant fiscal impact, among them a law requiring local governments to provide death benefits to local fire fighters, and another law creating a new program requiring the appointment of interpreters for deaf jurors.<sup>177</sup> Other mandates, classified as laws that would reduce the tax base, were also found to have an insignificant fiscal impact. One such law extends the government leasehold exemption to airport properties. Another expands homestead exemptions for spouses of deceased disabled veterans and spouses with life estates.<sup>178</sup>

Criminal law and federal mandate exemptions were also enacted. A law dealing with prostitution and HIV transmission was determined to be exempt under the amendment's criminal law provisions. It requires mandatory HIV testing for defendants charged with certain crimes. Counties would incur the cost of the testing while the defendants are in their

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176. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1993 INTERGOVERNMENTAL IMPACT REPORT, Draft Edition, Aug. 1993, at 5. [hereinafter 1993 REPORT].

177. *Id.* at 6, 7.

178. *Id.* at 9, 10.

custody.<sup>179</sup> Another law, seeking to implement the Americans with Disabilities Act in the area of public transportation, was found to be exempt since it was passed in compliance with federal law.<sup>180</sup>

The 1993 legislation also included a number of laws that were determined to be excepted under the amendment. For example, one law increased the pension subsidy paid by local government employers by \$4 million. Another law requires state and local governments to spend funds to collect and segregate certain types of batteries. Both of these laws were found to fulfill important state interests and applied to similarly situated persons.<sup>181</sup> One law was found to fulfill an important state interest and was funded. It provides that local government involved in emergency management plans must develop their plans consistent with the state's plan.<sup>182</sup>

ACIR included a number of laws in its 1993 report that the legislative staff failed to identify as mandates. Some of these appear to require the expenditure of funds. One law, for example, lowers the blood/breath alcohol level to .08% for DUI's. The Report acknowledges the law will have an impact on county jails; however, staff determined the law was not a mandate.<sup>183</sup> Another law reduces the sales tax charged on milk and juice in vending machines. Again, staff determined that the amendment's language was not applicable to this law.<sup>184</sup>

The 1993 Report acknowledges those mandate provisions that lacked bill analyses to address the mandate problem as well as those mandate provisions that were added to laws within House and Senate chambers.<sup>185</sup> As to the former, the Report states that either an exemption or exception to the constitution's mandate provisions "may apply, but it is not documented in the Constitutional Restriction or Fiscal Impact sections of the staff analyses."<sup>186</sup>

The 1993 legislative activity shows no decrease in mandate activity; if anything, it demonstrates, much as the 1992 legislation, the widespread reliance on exemptions and exceptions to enact mandates.

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179. *Id.* at 9.

180. *Id.* at 8.

181. 1993 REPORT, *supra* note 176, at 8.

182. *Id.* at 9.

183. *Id.* at 7.

184. *Id.* at 9.

185. *Id.* at 5.

186. 1993 REPORT, *supra* note 176, at 5.



## B. Implementing Legislation

There were no attempts to enact implementing legislation during the 1993 legislative session.

## IX. LOCAL GOVERNMENT'S ASSESSMENT

Since there have been virtually no cases construing section 18,<sup>187</sup> we are left to consider local government's critique of legislative activity in the wake of the amendment. Close observers of the post-amendment legislative activity raise questions about the effectiveness of the provision in light of the Legislature's interpretation of section 18's language. That interpretation will be very persuasive in the event of later challenges.<sup>188</sup>

Depending on which level of government is offering an opinion, differing views of the amendment emerge. Generally speaking, the Florida League of Cities has been more positive about the effect of the amendment than has been the Florida Association of Counties.<sup>189</sup> However, each county and municipality in the state is affected differently, depending on its peculiarities, and accordingly, the views expressed below are not meant to accurately reflect the views of all of Florida's local governments.

According to the League of Cities, Florida cities are generally "thrilled" with the passage of section 18.<sup>190</sup> The amendment is viewed as a success because it requires the mandate issue to be faced head-on early in the legislative process, and forces an awareness on the part of legislators.<sup>191</sup> Many freshman legislators arrive in Tallahassee with many good ideas, but without any thought as to how they will be funded. Put another way,

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187. As of the writing of this article, only one case has construed the constitutional provision. See *In re B.C.*, 610 So. 2d 627, 628 (Fla. 1st Dist. Ct. App. 1992) (holding that article VII, section 18 operates prospectively).

188. See *Greater Loretta Improvement Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 669 (Fla. 1970) ("[W]here a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling.").

189. The author spoke to representatives of both the League of Cities and Association of Counties, and uses their views in this article to depict the general views of Florida's cities and counties, respectively.

190. Tipton, *supra* note 52.

191. *Id.*

government will run out of money before it runs out of ideas.<sup>192</sup> The amendment has helped to open the eyes of legislative newcomers.<sup>193</sup>

While the League of Cities is generally optimistic about the amendment and has pledged to work closely with legislators to deal with individual mandate issues,<sup>194</sup> it does pinpoint a few concerns. One problem stems from the ease with which the "important state interest" requirement can be met. It appears that a legislator merely has to say that a bill fulfills such an interest and the hurdle is met.<sup>195</sup> Once that simple step is taken, a mandate will qualify for an exception under section 18 if any of subsection (a)'s exceptions are met.<sup>196</sup> Viewed in this manner, the exceptions to the mandate restriction are really nothing more than additional exemptions.

A second concern raised by the League of Cities is the lack of legislation that defines "insignificant fiscal impact." The Legislature's current use of \$1.4 million<sup>197</sup> as the threshold below which an insignificant fiscal impact will be found is somewhat arbitrary and leads to an easier finding of an exemption. However, there may be some benefit in not having the term defined by way of implementing legislation, since it could give a challenging local government more leeway to argue that a mandate under this guideline is, in fact, significant.<sup>198</sup> Whether there is implementing legislation or not, the League's position is that the state would have to shoulder the burden of demonstrating that any mandate has an insignificant fiscal impact or is otherwise exempt or excepted from section 18's reach.<sup>199</sup>

Florida's Association of Counties gives section 18 a less favorable review. This is due, in part, to a feeling that county services are more broad-based than those of cities, which in turn makes counties more susceptible to mandate legislation.<sup>200</sup> As are the cities, counties are

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192. *Id.*

193. *Id.*

194. For example, the League has used ACIR's FAXNET. See *supra* text accompanying note 103-05.

195. Tipton, *supra* note 52.

196. These include funding of the enactment, authorizing a funding source, approving the law by a two-thirds vote; finding that the law applies to all persons similarly situated; or finding that the law is required to comply with a federal mandate.

197. This figure is based on a Florida population of 14 million applied to a ten cents per capita formula.

198. Tipton, *supra* note 52.

199. *Id.*

200. Telephone Interview with Alma Gonzalez-Neimeiser, Legislative Director, Florida Association of Counties (May 26, 1993).

dissatisfied with section 18's exemptions, particularly the criminal law and "insignificant fiscal impact" exemptions.

Criminal laws are not defined in the amendment, and counties would be pleased if the term was defined to encompass only those laws creating criminal liability and fixing punishment. Due to the silence of the amendment and the absence of any implementing legislation, counties point out that a law requiring local government expenditures for prisons could be exempt.<sup>201</sup> This fear is not unfounded. The law passed during the 1992 session requiring law enforcement agencies to comply with new administrative requirements in contraband-related seizures was determined by staff to be exempt as a criminal law.<sup>202</sup> Similarly, the 1993 mandatory HIV testing law for certain criminal defendants also passed as an exempt criminal law.<sup>203</sup>

Counties further urge implementing legislation to define "insignificant fiscal impact." The current use of a \$1.4 million threshold before fiscal significance comes into play does not correspond to the \$50,000 figure the state uses to determine whether a fiscal impact is significant.<sup>204</sup> Furthermore, under current procedures, legislative staffers are left to determine the matter themselves, sometimes in situations where reliable figures are not available.

While the exemptions may be the largest source of the counties' concern, the procedures for establishing the exceptions under the amendment also raise questions. As do cities, counties point to the ease with which an important state interest is determined. Often the language is merely inserted in a bill with little, if any, debate or discussion.<sup>205</sup> The 1992 law allowing the inclusion of incentive pay in police retirement benefits, as well as the law aimed at achieving "potty parity," were both determined to fulfill important state interests.<sup>206</sup> Arguably, anything the Legislature does is

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201. *Id.* It is likely, however, that such a law could also qualify as an exception if it applied to all counties under the "all persons similarly situated" exception.

202. 1992 REPORT, *supra* note 96, at 8.

203. 1993 REPORT, *supra* note 176, at 9.

204. Gonzalez-Neimeiser, *supra* note 200. The Revenue Estimating Conference, created by Florida Statutes section 216.053, uses the \$50,000 figure to determine fiscal significance. See FLA. STAT. § 216.053 (1991); see also Governor's Veto Message of SB 2000, reprinted in 2 FLA. S. JOUR. 10 (Spec. Sess. C 1991).

205. Gonzalez-Neimeiser, *supra* note 200.

206. 1992 REPORT, *supra* note 96, at 8. Unfortunately, the Report fails to articulate exactly what important state interests are involved.

important to the state.<sup>207</sup> The 1993 law increasing local government pension subsidies and regulating battery collection also passed under this provision.<sup>208</sup>

Counties also point to a more subtle problem. If the important state interest determination is made, a law will be excepted from the amendment's prohibition if "the expenditure is required to comply with a law that applies to all persons similarly situated, *including the state and local governments . . .*"<sup>209</sup> This exception has been relied upon by legislative staff and is becoming more of a concern to counties.<sup>210</sup> Because of the language which appears to treat local governments as "persons" for the purposes of the exception, a law could be deemed to fall within the exception if it equally affects all counties. Counties see this as a less conspicuous way to bypass the amendment's provisions.<sup>211</sup> For example, the "potty parity" law passed under this exception.<sup>212</sup>

A further claim made by the counties is that the two-thirds majority vote exception is not difficult to meet, since a two-thirds vote, even of the full membership, is not uncommon for many laws. This appears to be true. By way of example, of those general bills originated in the Senate during the Regular Session of the 1992 Legislature, 138 were passed by both houses. Of those bills, only twelve, or just less than ten percent, failed to meet the two-thirds membership vote.<sup>213</sup> Counties would prefer to see a three-fourths majority vote in its place.<sup>214</sup>

Even though counties appear less optimistic about the impact of section 18, they are not without any favorable response. The amendment is perceived as helping counties maintain revenues, particularly state-shared funds such as those generated by the sales tax.<sup>215</sup> Since any attempt by

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207. The subjects determined to fulfill important state interests for the purposes of section 18's exceptions contrast sharply with those deemed by the courts to serve an important state interest in other constitutional law contexts. *See, e.g.,* Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989) (preservation of life); Winn-Dixie Stores, Inc. v. State, 408 So. 2d 211 (Fla. 1981) (promoting the disclosure of campaign contributors); Kendrick v. Everheart, 390 So. 2d 53 (Fla. 1980) (protecting the welfare of children).

208. 1993 REPORT, *supra* note 176, at 8.

209. FLA. CONST. art. VII, § 18 (emphasis added).

210. Gonzalez-Neimeiser, *supra* note 200.

211. *Id.*

212. 1992 REPORT, *supra* note 96, at 8.

213. LEGISLATIVE INF. DIV., JOINT LEGISLATIVE MANAGEMENT COMM., FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION 5, 22-194 (1992).

214. Gonzales-Neimeiser, *supra* note 200.

215. *Id.*

the Legislature to redistribute revenue sharing to the detriment of local governments would bring section 18 into play, the Legislature has had to look for other ways to improve the state's fiscal condition.<sup>216</sup> The result has been more of a hands-off attitude toward local governments' existing funding. In fact, recent sessions have attempted to help local governments by passing laws authorizing more flexibility in collecting revenues at the local government level.<sup>217</sup>

Counties do agree that the amendment institutionalizes the mandate issue and forces the Legislature to confront it early on. While the political realities of trade-offs between local governments and the Legislature continue, the mandate provision seems to work more to the advantage of local governments, who were forced to work with less leverage before the amendment's passage. In that respect, the amendment has had significant impact.<sup>218</sup>

Despite the limited favorable views of Florida's counties and cities, any individual local government may be more or less pleased with the amendment, depending on that locality's particular circumstances. For example, in spite of the promise of section 18, the city of Fort Lauderdale has been losing money because its permanent population is decreasing. Since its share of state sales tax revenues depends on the population base,<sup>219</sup> Fort Lauderdale's share has decreased in recent years. Section 18 does not prevent that type of revenue loss.<sup>220</sup> To a certain extent, Fort Lauderdale does not see the amendment as necessarily helping it maintain its existing level of funding. In fact, Fort Lauderdale is further concerned that the amendment does not prevent the Legislature from separating large ticket items into a number of smaller components to enable it to pass a number of bills under the "insignificant fiscal impact exemption."<sup>221</sup> Cities such as Fort Lauderdale also struggle to meet federal mandates and mandates that pre-date the amendment's passage, which are also not implicated by section

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216. *Id.* Ms. Gonzalez-Neimeiser used the example of a law that repealed certain sales tax exemptions. The law resulted in more state funds. The legislative alternative would have been to cut back on local governments' share of sales tax funds. The latter course would have required compliance with section 18; the legislature opted for the former course of action. *Id.*

217. 1992 REPORT, *supra* note 96, at 8-10.

218. Gonzalez-Neimeiser, *supra* note 200.

219. See FLA. STAT. § 218 (1991).

220. Telephone Interview with Terry Sharp, Budget Director, City of Fort Lauderdale, Fla. (June 8, 1993).

221. *Id.*

18.<sup>222</sup> In the face of these difficulties, cities such as Fort Lauderdale are having to find help beyond section 18 to combat their fiscal problems.<sup>223</sup>

It is fair to say that local governments see the amendment as a mixed blessing. While it has created a legislative awareness of the mandate problem, the amendment's provisions nevertheless allow many mandates to be enacted, and do not help local governments comply with pre-existing mandates. Local governments are also awaiting almost certain mandates that would be allowed under the amendment, including federal environmental mandates and state mandates pertaining to the court system.<sup>224</sup>

## X. CONCLUSION

The great expectations harbored by struggling local governments have not been fully met by article VII, section 18, of the Florida Constitution. This is at once made apparent by the steady and dramatic increase in mandate legislation since the amendment's passage. At its worst, this spiral may indicate a legislative belief that any mandate can be made to fit one of the constitution's exemptions or exceptions. However, when considered in light of its articulated purpose—to give local governments greater bargaining power on the subject of unfunded state mandates and to protect local revenue sources—section 18 reaches some level of success. Cities and counties generally agree that the measure has institutionalized, at an early stage of legislation, the mandate issue, and that it has helped, to a certain extent, maintain existing funding.

Before the issue loses momentum, local governments should lobby for implementing legislation to restrict the Legislature's reliance on both the criminal law and "insignificant fiscal impact" exemptions.<sup>225</sup> A limiting clarification of the "similarly situated persons" exception should also be considered. Such legislation should also assign venue for future disputes and should expressly place the burden of demonstrating compliance with the

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222. *Id.* For example, 85% of Fort Lauderdale's water treatment costs stem from federal and state mandates that pre-dated section 18.

223. For example, some older cities are finding themselves working with counties to help maintain funding in the face of population loss to suburban areas. Telephone Interview with George Hanbury, City Manager of Fort Lauderdale, Fla. (June 4, 1993).

224. Tipton, *supra* note 52; Gonzalez-Neimeiser, *supra* note 200.

225. Tipton, *supra* note 52. Generating the legislative interest necessary to enact implementing legislation may prove difficult. There was no effort to pass implementing legislation in the 1993 legislative session. There is a feeling that the Legislature may believe it has provided enough assistance to local governments by originating the amendment. *Id.*

amendment on the Legislature. Other ambiguities in the amendment will likely have to await judicial determination. In the meantime, section 18 leaves Florida's local governments better off than they were prior to its adoption, but they are not yet where they want to be. To paraphrase the remarks of one city official, before section 18 was adopted, local governments operated in quicksand; now they have touched bottom, but they are still waiting for someone to throw them a rope.<sup>226</sup>

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226. Hanbury, *supra* note 223.

# WARNING: Municipal Home Rule is in Danger of Being Expressly Preempted By . . .

**Ilene S. Lieberman\***  
**Harry Morrison, Jr.\*\***

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\* Ilene Lieberman is currently the President of the Florida League of Cities and the Mayor of the City of Lauderhill. For the past two years, Mayor Lieberman has served as 2nd and 1st Vice-President of the Florida League of Cities, respectively.

Mayor Lieberman received her B.A. in 1968 from the State University of New York, College at Cortland. She received her M.A. from New York University in 1974. In 1989, she received her J.D. from the Nova University Shepard Broad Center for the Study of Law, graduating summa cum laude. She was admitted to the Florida Bar in 1990.

Ms. Lieberman has served as Mayor of Lauderhill since 1988. Prior to that time, she served four years on the City Council, two terms as president of the council, and one term as treasurer. Mayor Lieberman represented municipal interests on the third Environmental Land Management Study Commission and the Governor's Growth Management Advisory Committee and is presently serving on the Advisory Council on Intergovernmental Relations.

Mayor Lieberman also serves on the National League of Cities' Finance, Administration, and Intergovernmental Relations Steering Committee and has recently been appointed as the national representative for municipal interests on Census 2000.

\*\* Harry (Chip) Morrison is the General Counsel to the Florida League of Cities in Tallahassee. He has represented the League since 1982. He received his B.S. from Florida State University in 1978, majoring in political science with minors in business administration and history. He received his J.D. from FSU in 1981 and was admitted to the Florida Bar in 1982. He presently serves on the Executive Council of the Local Government Section of the Florida Bar and is a member of the Environmental and Land Use Section of the Florida Bar. Mr. Morrison served as Executive Secretary of the Florida Municipal Attorneys Association from 1987 to 1990.

Mr. Morrison lobbies on municipal issues in the state legislature. He consults with City Attorneys throughout the state. He has filed a number of briefs with Florida's appellate courts on municipal issues of statewide concern. He also serves as General Counsel to the independent Boards of Trustees of Florida League of Cities on their workers' compensation, liability, health, reinsurance, investment, and pension programs.



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## I. INTRODUCTION

This year, Florida's municipalities are commemorating twenty-five years of Home Rule Authority. This celebration, however, may be short-lived due to legislative and judicial erosion of local decision-making authority.

Municipalities in Florida predated statehood. Pensacola and St. Augustine existed under the civil law of Spain. The legislative council of the territory of Florida established the incorporated areas of Tallahassee and Quincy. After Florida's admission into the Union, these municipalities as well as newly created municipalities, continued to exist under the laws enacted by the General Assembly under the Florida Constitution of 1838. New municipalities were then established by special or local law.<sup>1</sup>

Then, as now, one characteristic distinguished municipalities from all other units of local government in Florida. Unlike other units of local government, municipalities were organized by their citizens primarily to promote their exclusive needs and conveniences.<sup>2</sup> However, despite their "citizen driven" role, the law in Florida prior to the 1968 constitutional revisions severely restricted a city's ability to exercise the powers of local self-governance. The control of the state's Legislature over municipalities was plenary.<sup>3</sup> Municipalities could possess and exercise only those powers expressly granted by the Legislature or necessarily or fairly implied in or incident to the powers expressly granted, and those powers essential to the declared purposes of the municipality.<sup>4</sup> If reasonable doubt existed as to whether a municipality could exercise a certain power, the doubt would, as a matter of law, be resolved against the municipality.<sup>5</sup>

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1. *State ex rel. Atty. Gen. v. City of Avon Park*, 149 So. 409, 412 (Fla.), *reh'g denied*, 151 So. 701 (Fla. 1933), *modified*, 158 So. 159 (Fla. 1934).

2. *Loeb v. City of Jacksonville*, 134 So. 205 (Fla. 1931); *see also Avon Park*, 149 So. at 412; *City of Clearwater v. Caldwell*, 75 So. 2d 765 (Fla. 1954).

3. *See infra* note 40 and accompanying text.

4. *Liberis v. Harper*, 104 So. 853, 854 (Fla. 1925).

5. *Id.*; *see also City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972); *City of Clearwater*, 75 So. 2d at 765.

As the population of the state grew, this governance from the top down became more and more cumbersome. As the number of local bills increased, the limited state legislative time available was severely impacted. By returning local decision making to municipal governments, the State Legislature would eliminate the profusion of local bills and could therefore concentrate on issues of statewide significance.<sup>6</sup>

## II. THE HOME RULE AMENDMENT

Home Rule Authority has often been defined as the unfettered authority of citizens to manage their own local affairs. Home Rule Authority was given municipalities as one of the constitutional revisions ratified by Florida's electorate on November 5, 1968.<sup>7</sup> Florida's Municipal Home Rule Amendment to the Florida Constitution ("the Amendment"),<sup>8</sup> was first proposed in Senate Joint Resolution 5-2X of 1968 ("SJR 5-2X").<sup>9</sup> The Amendment clearly reflected a fundamental change in the rules governing the exercise of municipal power in Florida to date. "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."<sup>10</sup>

Furthermore, the legislative analysis of SJR 5-2X stated that under the new article "[m]unicipalities would be given additional powers to perform services unless specifically prohibited by law" and the municipal power provision "gives municipalities residual powers except as provided by law."<sup>11</sup> This was in sharp contrast to article VIII, section 8, of the 1885 Florida Constitution which stated that "[t]he Legislature shall have the power to establish, . . . municipalities . . . to prescribe their jurisdiction and powers, and to alter or amend the same at any time."<sup>12</sup> Whereas the 1885 Florida Constitution restricted the independent operation of municipal authority, the broad grant of power in the 1968 revisions to "exercise *any*

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6. See George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643, 643 (1991).

7. FLA. CONST. art. VIII, § 2(b).

8. *Id.*

9. Fla. SJR 5-2X (1968) (Amendment FLA. CONST. of 1885 art. VIII, § 8).

10. *Id.*

11. Louis D. Deal, *Post Mortem—Home Rule*, FLORIDA MUNICIPAL RECORD, Nov. 1980.

12. FLA. CONST. of 1885, art. VIII, § 8.

power for municipal purposes . . .”<sup>13</sup> clearly intended to vest the authority for decisions with respect to appropriate municipal purposes in the municipal governing body.

In 1972, the Florida Supreme Court had its first occasion to examine the extent to which the rules governing the exercise of municipal power had changed. In *City of Miami Beach v. Fleetwood Hotel, Inc.*,<sup>14</sup> the court held the city could not adopt a rent control ordinance absent specific legislative authorization.<sup>15</sup> In doing so, the court generally concluded that the Amendment had not changed the historical rules governing the exercise of municipal power.<sup>16</sup> “The powers of a municipality are to be interpreted and construed in reference to the purposes of the municipality and if reasonable doubt should arise as to whether the municipality possesses a specific power, such doubt will be resolved against the City.”<sup>17</sup>

Only the dissent, written by Justice Ervin, recognized how the Amendment had changed the rules of construction with respect to municipal authority.<sup>18</sup> In Justice Ervin’s view, no longer would the court look to legislative authority for the validation for the ordinance. Instead, the new article created a deference for municipal ordinances adopted for a *municipal purpose* which was *not prohibited or preempted* by existing state law.<sup>19</sup>

The following year the State Legislature, in response to the court’s incorrect view, enacted the Municipal Home Rule Powers Act (the “Act”).<sup>20</sup> Article VIII, section 2(b) of the Florida Constitution is specifically referenced in the Act and almost identical enabling language repeated so as to eliminate any confusion as to what was intended.<sup>21</sup> The only difference was in the limitations. Whereas the Florida Constitution of 1968 only limited home rule authority “except as otherwise provided by law,”<sup>22</sup> section 166.021(1) of the Florida Statutes only limited home rule authority “except when **expressly prohibited** by law.”<sup>23</sup>

The Act further provided for liberal construction to enable “broad

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13. FLA. CONST. art. VIII, § 2(b) (emphasis added); *see supra* text accompanying note 6.

14. 261 So. 2d 801 (Fla. 1972).

15. *Id.* at 804.

16. *Id.* at 803-04.

17. *Id.* at 803 (citing *Liberis*, 104 So. at 854).

18. *Id.* at 807-08 (Ervin, J., dissenting).

19. *Fleetwood Hotel*, 261 So. 2d at 807-08 (Ervin, J., dissenting) (emphasis added).

20. FLA. STAT. ch. 166 (1973).

21. *Id.* § 166.021(1).

22. FLA. CONST. art. VIII, § 2(b); *see supra* text accompanying note 6.

23. FLA. STAT. § 166.021(1) (1991) (emphasis added).

exercise of the home rule powers granted” under the Florida Constitution as evidenced by the language “and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.”<sup>24</sup> Moreover, “[a]ll existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality except as otherwise provided” became ordinances of the municipality.<sup>25</sup> Finally, the Act repealed the majority of general laws that had previously authorized the exercise of municipal power and left to the discretion of the municipalities the exercise of any powers previously contained in the various repealed state statutes subject to terms and conditions the municipalities themselves chose to prescribe.<sup>26</sup>

Thereafter, the Florida Supreme Court upheld a subsequent rent control ordinance enacted by the City of Miami Beach relying on the Act.<sup>27</sup> In *State v. City of Sunrise*,<sup>28</sup> the Florida Supreme Court tacitly receded from its earlier holding in *City of Miami Beach v. Fleetwood Hotel*,<sup>29</sup> and acknowledged the vast breath of municipal home rule power.<sup>30</sup>

Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid “municipal purpose.” It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.<sup>31</sup>

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24. *Id.* (emphasis added). Remaining limitations on home rule authority: (a) annexation, merger, and the exercise of extraterritorial powers; (b) subjects expressly prohibited by the Constitution; (c) subjects preempted to the state or county government by constitution or general law; and (d) subjects preempted to a county pursuant to a county charter. *Id.* § 166.021(3).

25. *Id.* § 166.021(5); see also *State v. City of Miami*, 379 So. 2d 651 (Fla. 1980). Special laws or municipal charter provisions dealing with any of the following were not subject to this general repeal: (a) the exercise of extraterritorial powers; (b) creation or existence of the municipality, the terms of elected officers and the manner of their election, or the distribution of powers among elected officials; or (c) matters relating to appointed boards, any change in the form of government, and any rights of municipal employees. Changes to any of these charter provisions require approval by referendum of the electors. *Id.* § 166.021(4).

26. FLA. STAT. § 166.042(1) (1991).

27. *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1974).

28. 354 So. 2d 1206 (Fla. 1978).

29. *Fleetwood Hotel*, 261 So. 2d at 801.

30. *City of Sunrise*, 354 So. 2d at 1206.

31. *Id.*

To date, the Florida Supreme Court has continued to recognize the "residual" nature of municipal home rule authority, even when specific authority has been granted certain other entities and municipalities are not mentioned in the enabling statute.<sup>32</sup> Thus, the general rule is that if the state has the authority to exercise a particular power, then a municipality, under its home rule authority, may also exercise that power unless it is "expressly prohibited."<sup>33</sup>

### III. LIMITATIONS ON HOME RULE AUTHORITY

Home rule powers are not unlimited. Generally speaking, municipalities may exercise any power for "municipal purposes," except when "expressly prohibited by law."<sup>34</sup> Initially, express limitations were contained in the Florida Constitution, county charters and ordinances pursuant thereto, and municipal charters and ordinances.<sup>35</sup> Subsequently, additional limitations have been added by the courts in construing the application of the "expressly prohibited by law" provision contained in section 166, of the Florida Statutes, by the Legislature by preempting home rule authority on certain subjects, and by various state agencies in their interpretation of statutory authority delegated to them by the state.<sup>36</sup> All of these entities have constricted the sphere of home rule authority to less than what was intended by the revisions to the 1968 Florida Constitution.

#### A. *Municipal Charter and Ordinances*

A municipality's charter and ordinances, not unlike the state's constitution and statutes, are the paramount governing instruments of the municipality and the fundamental law of the citizens served by the municipality.<sup>37</sup> Both the governing body, by ordinance, and its citizens, by petition initiative, can require a referendum and subsequently limit their own Home Rule Authority.<sup>38</sup> With rare exceptions,<sup>39</sup> this limitation on

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32. See *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992); *City of Boca Raton v. State*, 595 So. 2d 25, 30 (Fla. 1992).

33. *Nye*, 608 So. 2d at 17.

34. FLA. STAT. § 166.021(1) (1991).

35. See *infra* notes 35-50 and accompanying text.

36. For a state agency analysis, see *infra* notes 141-59 and accompanying text.

37. *Fleetwood Hotel*, 261 So. 2d at 803 (citing *Gontz v. Cooper City*, 228 So. 2d 913 (Fla. 4th Dist. Ct. App. 1969)).

38. FLA. STAT. § 166.031 (1991)

a municipality's Home Rule Authority has generally been upheld by the courts.<sup>40</sup> However, since this is a limitation which is self-imposed, it will not be discussed in this article.

### B. *County Charter and Ordinances*

Non-charter counties have only the authority given them by general and special law and cannot preempt the municipal Home Rule Authority of cities and towns within that county's geographic boundaries.<sup>41</sup> However, article VIII, section 1(f) of the Florida Constitution also provides for establishing charter counties pursuant to a county-wide referendum.<sup>42</sup> Out of sixty-seven counties, only twelve are charter counties who can themselves exercise home rule authority.

In the event of conflict between county and municipal ordinances, the county's charter must state which will prevail.<sup>43</sup> Any county ordinance adopted by the charter county pursuant to its preemptive authority will supersede conflicting municipal ordinances.<sup>44</sup> A county's charter may preempt to the county a sphere of regulation, but not a sphere of municipal service;<sup>45</sup> the municipalities could otherwise undertake under their home rule authority.<sup>46</sup> However, since a county-wide referendum is required for adoption of a county charter, and any subsequent amendment thereto, it too is a self-imposed limitation.<sup>47</sup>

### C. *The Constitution*

Florida's Constitution places several fundamental limitations on the exercise of municipal home rule authority. In addition to the clause "except as otherwise prohibited by law," article VIII, section 2(c) preempts to the State Legislature control of municipal annexation, merger, and the exercise

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39. See *Gaines v. City of Orlando*, 450 So. 2d 1174 (Fla. 5th Dist. Ct. App. 1984); *West Palm Beach Ass'n of Firefighters Local 727 v. Board of City Comm'n*, 448 So. 2d 1212 (Fla. 4th Dist. Ct. App. 1984).

40. *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983); see also *Gaines*, 450 So. 2d at 1174.

41. FLA. CONST. art. VIII, § 1(f).

42. *Id.*

43. *Id.* § 1(g).

44. FLA. STAT. § 166.021(3)(d) (1991).

45. *Sarasota County v. Town of Longboat Key*, 355 So. 2d 1197 (Fla. 1978).

46. *Broward County v. City of Fort Lauderdale*, 480 So. 2d 631 (Fla. 1985).

47. See *supra* note 41 and accompanying text.

of extra-territorial authority.<sup>48</sup> While other articles of the Florida Constitution also impose limitations, the most poignant example in this area is the taxing authority of municipalities. Without adequate revenue streams, it is difficult at best to exercise Home Rule Authority. Article VII, section 1 requires enabling statutes before a municipality can enact a new tax, increase an existing tax above any statutory cap, or increase a tax which had been frozen by state statute.<sup>49</sup> “[E]xcept for ad valorem taxes, municipalities may be granted the power to levy any tax only by general law. . . . Any tax not authorized by general law must necessarily fall by virtue of the preemption clause of Fla. Const. Art. VII, § 1 (1968).”<sup>50</sup> As was the case prior to the adoption of the Amendment, a municipality may still levy only those taxes authorized by the constitution or by the state.<sup>51</sup> Thus, any doubts as to whether a municipality may levy a tax will be resolved against the municipality.<sup>52</sup>

#### D. *The State Legislature*

Unquestionably, the greatest intrusion on home rule authority has come from the State Legislature under the “expressly prohibited by law” provision in Florida Statute section 166.021(1).<sup>53</sup> The power of the State Legislature over municipalities in Florida is plenary,<sup>54</sup> and the passage of article VIII, section 2 did not alter this relationship. The superior authority of the State Legislature is implicit in the enumerated limitations expressed in Florida Statutes section 166.021(1) and article VIII, section 2 of the Florida Constitution.<sup>55</sup> Article VIII simply changed the measure to one of limitation rather than authorization, but the ability to limit is an all-pervasive power.<sup>56</sup>

The State Legislature may still restrict a municipality’s home rule

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48. FLA. CONST. art. VIII, § 2(c).

49. *Id.* art. VII, § 1.

50. *City of Tampa v. Birdsong Motors Inc.*, 261 So. 2d 1, 3 (Fla. 1972); *see also*, *Belcher Oil Company v. Dade County*, 271 So. 2d 118 (Fla. 1972).

51. *Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello*, 31 So. 2d 905, 909 (Fla. 1947).

52. *City of Miami v. Kayfetz*, 30 So. 2d 521, 524 (Fla. 1947) (Statutes authorizing a municipality to levy a particular tax will be strictly construed and cannot be extended by implication to include items not expressly included in the enabling statute).

53. FLA. STAT. § 166.021(1) (1991).

54. *State v. City of Boca Raton*, 172 So. 2d 230, 232 (Fla. 1965).

55. *Lake Worth Utils. Auth. v. City of Lake Worth*, 468 So. 2d 215, 217 (Fla. 1985).

56. *Id.*

authority by general law.<sup>57</sup> Municipal ordinances must give way to state law to the extent the ordinance conflicts with state law, and a municipality's power to regulate in a particular area may be entirely or partly preempted by general law.<sup>58</sup> The conflict doctrine and the preemption doctrine are often referred to interchangeably; but, they are two fundamentally distinct doctrines. In general, the concept of conflict may be distinguished from the concept of preemption in that the latter effectively precludes all municipal regulation in a given area while the former permits municipal regulation, but only to the extent it supplements state law.<sup>59</sup>

An ominous trend has been the exercise of the state's preemptive authority in zoning issues. Zoning has long been considered the traditional domain of municipal decision making. Since 1968, at least eleven statutes have been enacted expressly preempting municipal regulation with respect to siting.<sup>60</sup> These statutes appear to be the result of legislators' perceptions that the "NIMBY"<sup>61</sup> syndrome inhibits the location of such facilities. More insidious are those statutes which regulate use of land,<sup>62</sup> prescribe a myriad of procedural requirements,<sup>63</sup> or remove regulatory authority,<sup>64</sup> and in

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57. *City of Miami Beach v. Frankel*, 363 So. 2d 555 (Fla. 1978) (the court invalidated a municipal rent control ordinance because the City failed to comply with a state statute regulating rent control ordinances); *see also City of Sanibel v. Buntrock*, 409 So. 2d 1073 (Fla. 2d Dist. Ct. App. 1981) (the court invalidated a building moratorium ordinance on the grounds that statutory notice provisions were not followed). In both cases, however, the municipal ordinance met the municipal purpose tier of the test. *See Frankel*, 363 So. 2d at 557; *City of Sanibel*, 409 So. 2d at 1075.

58. *Frankel*, 363 So. 2d at 557; *see also City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d Dist. Ct. App. 1981).

59. *Rocio Corp.*, 404 So. 2d at 1068-69; *see also Edwards v. State*, 422 So. 2d 84 (Fla. 2d Dist. Ct. App. 1982).

60. Total siting preemption has occurred for juvenile facilities, FLA. STAT. § 39.074 (1991); amateur radio antennas, *id.* § 166.0435; family day care homes, *id.* § 166.0445; electricity transmission lines, *id.* § 403.536; alcoholic beverage off-premise sales license, *id.* § 563.02; community residential homes, FLA. STAT. § 419.001 (1991); and prisons sitings, *id.* § 944.095. Partial preemption has occurred for high speed rail, *id.* § 341.302; electrical power plant siting, *id.* § 403.501-403.518; rezoning of mobile home parks, *id.* § 723.083; and natural gas lines, FLA. STAT. § 368.041 (1992).

61. "NIMBY" is the common zoning and land use acronym for Not In My Back Yard.

62. Preemption of local government authority in: the regulation of wetlands, ch. 93-213, § 32, 1993 Fla. Laws 2129, 2150 (to be codified at FLA. STAT. § 373.422); and alteration of mangroves, *id.*, § 40, 1993 Fla. Laws at 2155 (amending FLA. STAT. § 403.931 (1992)).

63. Some examples are: how and where to conduct meetings, FLA. STAT. §§ 166.041, 286.011 (1991); purchase of real property, *id.* § 166.045; ad valorem tax increase notices, *id.* § 200.065.



doing so, clearly infringe on local discretion.

Even the advance of progressive laws governing growth management in Florida have come at the expense of municipal control over land use and development matters. While section 163.3184 of the Florida Statutes on its face empowers a municipality to determine its future within wide parameters by preparing a comprehensive plan, in fact, the approval of the state through its Department of Community Affairs is required before implementation of the plan may occur at the local level.<sup>65</sup> Municipal decision-making under this chapter is clearly contingent upon the approval of an arm of state government. The Department of Community Affairs has the ability to find that a local comprehensive plan fails to comply with state law and to thereby initiate a process under which punitive sanctions may be assessed against that municipality.<sup>66</sup> By adopting this top-down approach, the state appears to have come full circle and to have rejected its original home rule position that the state should not be interfering in matters of local concern.

### E. *The Courts*

One substantial intrusion into municipal home rule is the judicially created two-tier test which is used to determine whether a municipal ordinance is a valid exercise of home rule authority.<sup>67</sup> The first portion of the test looks to whether the action is undertaken for a municipal purpose.<sup>68</sup> If so, the second portion of the test looks to whether that action is expressly prohibited by the constitution, general or special law, or county municipal charter.<sup>69</sup>

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64. Municipalities and counties are prohibited from enacting laws about: the possession, use, or transportation of sources of radiation, *id.* § 404.166; local employment registration or screening procedures whereas the same is permitted for business, institution, association, profession, or occupation categories, subject to certain limitations, *id.* § 166.0443; possession or sale of ammunition, FLA. STAT. § 166.044 (1991); prohibiting the installation of energy devices based upon renewable resources, *id.* § 163.04; elevator accessibility for the handicapped, ch. 93-16, § 4, 1993 Fla. Laws 129, 133 (to be codified at FLA. STAT. § 399.045); local licensing of building inspectors, ch. 93-166, § 24, 1993 Fla. Laws 1015, 1057 (to be codified at FLA. STAT. § 468.606); defining solid waste, ch. 93-207, § 8, 1993 Fla. Laws 1976, 1988 (to be codified at FLA. STAT. § 403.703); and defining substance abuse impairment and creating impairment offenses, ch. 93-39, § 2, 1993 Fla. Laws 215, 215-19 (to be codified at FLA. STAT. § 397.305).

65. FLA. STAT. § 163.3184 (1991).

66. *Id.* § 163.3184(11).

67. *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1280 (Fla. 1983).

68. *Id.*

69. *Id.*

The definition of municipal purpose is very broad and includes all activities essential to the health, morals, protection, and welfare of the municipality.<sup>70</sup> Despite a general deference to the municipal governing body's determination of whether or not a particular activity serves a municipal purpose, the test itself still creates a potential for courts to sit as a super legislative body when they retroactively review and evaluate the activities of a municipal government to determine whether the activities in question fit the courts' definition of a municipal purpose. Municipal decisions are based upon the individual governing body's evaluation of the needs, concerns, issues, expectations, and perceptions of its citizens. The courts lack this perspective when evaluating the municipal purpose tier of the test and may therefore substitute their own judgment instead. Post 1968 case law reflects the following has been held to constitute a "municipal purpose":

- a) The provision of day care educational facilities;<sup>71</sup>
- b) Issuing bonds to finance a convention center which would provide a forum for educational, civic and commercial activities and would increase tourism and trade;<sup>72</sup>
- c) Using public property for a sports stadium;<sup>73</sup>
- d) The sale of souvenir photographs; and <sup>74</sup>
- e) The expenditure of funds to promote the passage of a referendum.<sup>75</sup>

Thus, as a general rule, a municipality's exercise of power would have to constitute a clear and gross abuse of discretion in order to fall within this limitation. A municipality can even provide a service or operate a facility that competes with a privately owned business and still effectuate a municipal purpose.<sup>76</sup> The phrases "municipal purpose" and "public purpose" have often been used interchangeably by the courts.<sup>77</sup>

However, the courts have also found that the following activities serve

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70. *State v. City of Jacksonville*, 50 So. 2d 532, 535 (Fla. 1951).

71. *Gidman*, 440 So. 2d at 1280.

72. *State v. City of Miami*, 379 So. 2d 651, 653 (Fla. 1980).

73. *Rolling Oaks Homeowner's Assoc. v. Dade County*, 492 So. 2d 686, 686 (Fla. 3d Dist. Ct. App. 1986).

74. *City of Winter Park v. Montesi*, 448 So. 2d 1242, 1244-45 (Fla. 5th Dist. Ct. App. 1984).

75. *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1378 (Fla. 1991).

76. *Montesi*, 448 So. 2d at 1245.

77. *See id.* at 1244; *City of Miami*, 379 So. 2d at 652.

no "municipal purpose": borrowing money simply to reinvest the money and thereby derive a profit on the investment;<sup>78</sup> a municipal ordinance opting out of an otherwise valid county road impact fee ordinance in a charter county;<sup>79</sup> and the expenditure of public funds to promote the passage of a referendum.<sup>80</sup> These court findings show some inconsistency even though the breadth of home rule authority under the municipal purpose tier is quite broad.

In the area of preemption, the courts have tended to take a broad view of the doctrine. However, immediately following the passage of the Municipal Home Rule Powers Act,<sup>81</sup> students of municipal law initially believed the courts would take a very narrow view of the preemption doctrine at least in part because the Act provided that a municipality could enact legislation concerning any subject except on a subject "expressly preempted to the state."<sup>82</sup> It was thus assumed the historical doctrine of "implied preemption" no longer applied to the exercise of municipal home rule authority. This view initially prevailed in most Florida courts.<sup>83</sup>

The first indication the courts would apply a broad preemption doctrine to the home rule authority of municipalities came in *Tribune Co. v. Cannella*.<sup>84</sup> The court held the Public Records Act<sup>85</sup> preempted a municipality's authority to adopt a policy providing for a delay in producing public records for public inspection because the statute's "scheme of regulation of the subject is pervasive and . . . further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive

78. *State v. City of Orlando*, 576 So. 2d 1315, 1317 (Fla. 1991).

79. *City of Ormond Beach v. County of Volusia*, 535 So. 2d 302, 304-05 (Fla. 5th Dist. Ct. App. 1988).

80. *Palm Beach County v. Hudspeth*, 540 So. 2d 147, 154 (Fla. 4th Dist. Ct. App. 1989).

81. FLA. STAT. ch. 166 (1991) (originally enacted 1973)

82. *See id.* § 166.021(3)(c) (originally enacted 1973).

83. In *State v. City of Pensacola*, 397 So. 2d 922 (Fla. 1981), *Pace v. Board of Adjustment, Town of Jupiter Island*, 492 So. 2d 412, 415 (Fla. 4th Dist. Ct. App. 1986), *City of Venice v. Valente*, 429 So. 2d 1241 (Fla. 2d Dist. Ct. App. 1983), and *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d Dist. Ct. App. 1981), the courts upheld municipal ordinances because the relevant statutes contained no written provisions expressly limiting home rule authority.

84. 458 So. 2d 1075 (Fla. 1984). *But see Pace*, 492 So. 2d at 415 (where the court held that the town's setback ordinance was not preempted by section 161 of the Florida Statutes despite the statute's statewide comprehensive scheme for beach and shore preservation). There is some thought that the *Cannella* court's holding is more a result of the court's extremely high regard for the Public Records Law.

85. FLA. STAT. §§ 119.01-119.16 (1981).

regulatory scheme . . . .”<sup>86</sup> Since then, the Florida Supreme Court has continued to expand the doctrine of “implied preemption,” finding preemption where it appears that exclusive regulatory authority has been vested in another entity.<sup>87</sup> Generally, preemption will be found if the regulatory scheme appears to be all inclusive, so that legislation at the municipal level would undermine the state’s interest.<sup>88</sup> By expanding the application of this doctrine, the courts have implied preemption despite the lack of a specific express preemptive statement and where it may not have been intended by the Legislature. In fact, the Legislature has hardly been shy in stating that preemption of municipal regulation was intended when express preemption statements appear in at least sixteen different statutes.<sup>89</sup>

Ironically, while the use of the preemption doctrine has been expanded by the courts to substantially impair home rule authority, the use of the conflict doctrine, in its present form, is more narrowly construed than when the Home Rule Act was first adopted. Immediately prior to the onset of municipal home rule, the conflict doctrine was often broadly applied to invalidate municipal ordinances.<sup>90</sup> Municipal ordinances were considered inferior to state statutes and any reasonable doubts with respect to the ordinance’s effect on state statutes were resolved against the municipal ordinance.<sup>91</sup> Early guidelines for determining the existence of a conflict state “[a] municipality cannot forbid what the Legislature has expressly licensed, authorized or required, nor may it authorize what the Legislature has expressly forbidden.”<sup>92</sup> Under the *Rinzler v. Carson* court’s conflict doctrine, one is simply hardput to find a set of circumstances in which an ordinance speaking to the same subject as a statute would not conflict with the state law. After all, is there any set of circumstances in which a municipal ordinance does not either “forbid an activity permitted under state law” or “permit an activity forbidden under state law”?

The incongruity of this situation was tacitly recognized but unfortunately compounded in *City of Miami Beach v. Rocio Corp.*<sup>93</sup> The *Rocio* court defined the conflict doctrine as “[a]n ordinance which supplements a

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86. *Cannella*, 458 So. 2d at 1077 (quoting *Tribune Co. v. Cannella*, 438 So. 2d 516 (Fla. 2d Dist. Ct. App. 1983) (Lehan, J., dissenting)).

87. *Florida Power Corp. v. Seminole County*, 579 So. 2d 105 (Fla. 1991); *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989).

88. *Cannella*, 458 So. 2d at 1078-79.

89. See *supra* notes 54, 56-57 and accompanying text.

90. *Edwards v. State*, 422 So. 2d 84 (Fla. 2d Dist. Ct. App. 1982).

91. *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972).

92. *Id.*

93. 404 So. 2d 1066 (Fla. 3d Dist. Ct. App. 1981).

statute's restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute must fail."<sup>94</sup>

While the *Rocio* court found ordinances and statutes could theoretically "coexist,"<sup>95</sup> it is extremely difficult to determine a set of circumstances in which ordinances and statutes could in fact coexist under the court's view of the doctrine. How can an ordinance "supplement a state's restriction of rights," and not "countermand rights provided by statute"? For example, if state law permits a person to dredge and fill a wetland if the person satisfies three state established requirements, does the person not have a "right" to dredge and fill the wetland if he satisfies the three state requirements? If an ordinance "supplements the statute's restriction of rights" by requiring the person to satisfy an additional criteria before he may dredge and fill a wetland, hasn't the ordinance "countermanded rights provided by statute"?

A competing conflict analysis first emerged in *Jordan Chapel Freewill Baptist Church v. Dade County*.<sup>96</sup> In *Jordan*, the court stated that "the sole test of conflict for purposes of preemption is the impossibility of co-existence of the two laws."<sup>97</sup> Therefore, if compliance with a local ordinance requires violating a state statute or inhibits compliance with a state statute, an impermissible conflict exists.

The conflict doctrine was narrowed even further in *Pace v. Board of Adjustment*.<sup>98</sup> Though the city's set back ordinance did conflict with the general state policy of combatting beach erosion, the court did not invalidate the city's ordinance because it did not "require the petitioner to take any action which would violate the state law or forbid him from taking action which the state law requires. State and local provisions reflect conflicting policy considerations all the time, but this does not render the local provisions unenforceable."<sup>99</sup>

The practical dilemma presented by the courts' conflicting views of the doctrine was finally resolved in *Laborers' International Union of North America, Local 478 v. Burroughs*.<sup>100</sup> The court adopted the following conflict analysis: "In the regulatory area involved in this case, the test of conflict is whether one must violate one provision in order to comply with the other. Putting it another way, a conflict exists when two legislative

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94. *Id.* at 1070 (citations omitted).

95. *Id.*

96. 334 So. 2d 661 (Fla. 3d Dist. Ct. App. 1976).

97. *Id.* at 664 (citations omitted).

98. 492 So. 2d 412 (Fla. 4th Dist. Ct. App. 1986).

99. *Id.* at 415.

100. 541 So. 2d 1160 (Fla. 1989).

enactments 'cannot co-exist.'"<sup>101</sup>

The conflict analysis adopted by the court in *Laborers' International*, eschews the relatively esoteric analysis of whether an ordinance "supplements state restrictions" or "countermands rights granted by statute" in favor of a relatively straight forward and simple approach to conflict analysis. A conflict exists if the person must violate state law in order to comply with the ordinance or violate the ordinance in order to comply with state law. Stated differently, no conflict exists if the person can satisfy both state law and the local ordinance. Nor, as a general rule, will a conflict exist if an ordinance simply requires more stringent standards than those required under state law.<sup>102</sup> In the final analysis, *Laborers' International* injected into the conflict doctrine a healthy dose of respect for the residual nature of municipal home rule authority. As a result, courts will generally attempt to find some way for the statute and ordinance to co-exist. By narrowly applying the conflict doctrine, municipal home rule authority has made substantial inroads into this doctrine.

One of the most imminent potential intrusions into municipal home rule authority is the current debate over the extent to which the Local Government Comprehensive Planning and Land Development Regulation Act<sup>103</sup> ("The Growth Management Act") has altered the traditional zoning and planning powers of municipalities. Under the Growth Management Act, each municipality is required to prepare and adopt a comprehensive plan to manage future growth and development and implement land development regulations to fulfill the goals and objectives stated in that municipality's adopted plan.<sup>104</sup> The plan consists of elements and objectives and policies which govern each element. One element is the future land use element which is intended to designate "proposed future *general* distribution, location, and extent of the uses of land . . . ."<sup>105</sup>

Prior to the adoption of the Growth Management Act, the rezoning of a specific parcel of property was considered by the courts to be a legislative function.<sup>106</sup> While the rezoning decision had to bear a rational relationship

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101. *Id.* at 1161 (citations omitted) (emphasis added).

102. *But see Edwards*, 422 So. 2d at 85 (where a municipal ordinance conflicted with state law because it set a greater penalty for possession of cannabis and cocaine).

103. FLA. STAT. §§ 163.3161-163.3243 (1991).

104. *Id.* § 163.3177.

105. *Id.* § 163.3177(6)(a) (emphasis added).

106. *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170, 174 (Fla. 1983); *Schauer v. City of Miami Beach*, 112 So. 2d 838, 838 (Fla. 1959).

to the community's health, safety, and welfare,<sup>107</sup> the legislative character of the decision granted the municipality a great deal of latitude and discretion. So long as the decision was "fairly debateable," open to reasonable dispute or controversy, the courts would not question the wisdom of the rezoning decision.<sup>108</sup> Thus, the courts traditionally deferred to the local government's rezoning decision.<sup>109</sup>

To invalidate a presumptively valid municipal zoning decision, the burden is on the party challenging the rezoning decision to establish that the decision was not fairly debateable but "arbitrary, unreasonable, or confiscatory."<sup>110</sup> The adoption of a comprehensive plan by a municipality serves merely as a guide to future zoning decisions and therefore has no legal impact on the court's review of rezoning decisions.<sup>111</sup> However, recently courts have taken the opportunity to review the entire manner in which municipalities exercise their planning and zoning powers.

In *Snyder v. Board of County Commissioners of Brevard County*,<sup>112</sup> landowners petitioned the county to rezone their property to permit a higher density<sup>113</sup> than was permitted under the existing zoning on the property.<sup>114</sup> The existing density as well as the proposed density were permitted in the future land use element of the county's comprehensive plan.<sup>115</sup> In reviewing the county's denial of the landowners' rezoning request, the court held that the rezoning proceeding was quasi-judicial, rather than legislative.<sup>116</sup> As a result, the county was required to make specific findings of fact, giving specific reasons for denying the rezoning request.<sup>117</sup> Additionally, the court held that upon a showing by the applicant that the use sought was within the density permitted in the future land use element of the county's comprehensive plan, the burden shifted to the

107. *Ellison v. City of Fort Lauderdale*, 183 So. 2d 193 (Fla. 1966).

108. *City of Miami Beach v. Lachman*, 71 So. 2d 148, 152 (Fla. 1953), *appeal dismissed on other grounds*, 348 U.S. 906 (1955).

109. *Id.*

110. *Rural New Town, Inc. v. Palm Beach County*, 315 So. 2d 478 (Fla. 4th Dist. Ct. App. 1975); *cf. City of Miami v. Silver*, 67 So. 2d 646, 647 (Fla. 1953).

111. *Metropolitan Dade County v. Brisker*, 485 So. 2d 1349, 1351 (Fla. 3d Dist. Ct. App. 1986); *City of Gainesville v. Cone*, 365 So. 2d 737, 739 (Fla. 1st Dist. Ct. App. 1978).

112. 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991), *juris. accepted*, 605 So. 2d 1262 (Fla. 1992).

113. Density is the intensity of use permitted on a particular property. *Id.* at 69.

114. *Id.* at 66-67.

115. *Id.*

116. *Snyder*, 595 So. 2d at 79.

117. *Id.*

county to prove by clear and convincing evidence that a specifically stated public purpose required a more restrictive use, even if the more restrictive use was the currently existing use of the property.<sup>118</sup> Under *Snyder*, basic zoning ordinances and amendments of broad application are legislative acts because they are general in nature, whereas subsequent site specific rezonings are quasi-judicial because they involve applying the provisions of the existing ordinance, in this case the comprehensive plan, to the request at issue.<sup>119</sup> Under this court's rationale, the rezoning of a specific parcel is but a ministerial application of previously enacted legislative policy.<sup>120</sup>

Several courts have subsequently adopted the *Snyder* holdings to one degree or another. In *Lee County v. Sunbelt Equities*,<sup>121</sup> which also involved rezoning, the court concurred in part with the *Snyder* court when it held a county's rezoning of specific parcels of property is a quasi-judicial rather than a legislative function.<sup>122</sup> On the other hand, the *Sunbelt Equities* court rejected that portion of the *Snyder* court's holding governing the burden of proof.<sup>123</sup> Thus, the county's zoning ordinance was presumptively valid and the applicant bore the burden of demonstrating the unreasonableness of the zoning decision.<sup>124</sup> Also, in *City of Melbourne v. Puma*,<sup>125</sup> the *Snyder* court's earlier holding was extended when *Puma* held that amendments to a comprehensive plan are quasi-judicial in nature. In reaching this holding, the *Puma* court again based its decision on the size of the property which was the subject of the plan amendment. Overshadowing all of these holdings is *Jennings v. Dade County*,<sup>126</sup> where the court held that ex-parte communications in quasi-judicial proceedings are presumed prejudicial and a fundamental denial of due process.<sup>127</sup>

It is extremely difficult to believe that the State Legislature, in enacting the Local Government Comprehensive Planning and Land Development

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118. *Id.* at 81.

119. *Id.*

120. *Id.* at 80 n.62.

121. 619 So. 2d 996 (Fla. 2d Dist. Ct. App. 1993).

122. *Id.* at 1000-01.

123. *Id.* at 1005-06.

124. *Id.*

125. 616 So. 2d 190 (Fla. 5th Dist. Ct. App.), *review granted*, 624 So. 2d 264 (Fla. 1993).

126. 589 So. 2d 1337 (Fla. 3d Dist. Ct. App. 1991), *review denied*, 598 So. 2d 75 (Fla. 1992).

127. *Id.* at 1341-42.



Regulation Act,<sup>128</sup> ever intended or envisioned the courts would use this Act to reek havoc on the comprehensive planning, zoning, and land use processes of municipalities. The legislative intent of the Growth Management Act states that it “shall not be interpreted to limit or restrict the powers of municipal or county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land.”<sup>129</sup> The purpose of the Growth Management Act was to provide broad guidelines to municipalities in the preparation of their comprehensive plans and land development regulations, thereby enhancing municipal decision-making.<sup>130</sup> Though the *Snyder* court used the Growth Management Act’s planning requirements as the basis for its holding,<sup>131</sup> clearly this Act was never intended to supplant municipal decisions on such matters.<sup>132</sup>

Municipalities have traditionally enjoyed broad home rule authority in the areas of planning and zoning. It has long been the law of this state that zonings and amendments to zoning ordinances, such as rezonings, are legislative in nature.<sup>133</sup> A comprehensive plan is a broad policy statement of future goals and objectives and does not necessarily establish immediate limits on zoning.<sup>134</sup> General use zones are designated in zoning codes because the future growth of an area and appropriate uses to compliment and enhance that future growth is not capable of being specifically determined at the time the initial zoning ordinance was first adopted.<sup>135</sup> Each property is unique and the appropriateness of a particular rezoning may change between the time a municipality’s comprehensive plan is first adopted and the time the property is ready to be developed. Economies, technology, community values, and demographics can all change over time without necessitating an amendment to a city’s Comprehensive Plan or zoning ordinance.<sup>136</sup>

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128. FLA. STAT. §§ 163.3161-163.3243 (1991), as amended by FLA. STAT. §§ 163.3161-163.3243 (Supp. 1992).

129. FLA. STAT. § 163.3161(8) (1991).

130. *Id.*

131. *Snyder*, 595 So. 2d at 65.

132. FLA. STAT. § 163.3161(8) (1991).

133. *Schauer v. City of Miami Beach*, 112 So. 2d 838, 839 (Fla. 1959); see also *Florida Land Co. v. City of Water Springs*, 427 So. 2d 170, 174 (Fla. 1983).

134. *Snyder*, 595 So. 2d at 80-81; see also FLA. STAT. § 163.3117(1) (Supp. 1992).

135. *Snyder*, 595 So. 2d at 73.

136. The *Snyder* court requires the applicant to show that the rezoning request is consistent with the city’s comprehensive plan and upon such proof, the burden shifts to the city to show by *clear and convincing evidence* why the rezoning should not be granted.

The *Sunbelt Equities* court, while maintaining the traditional presumption that a municipalities rezoning decision is valid,<sup>137</sup> appears to have ignored the Legislature's intent to encourage public participation in the comprehensive planning process. "It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible."<sup>138</sup> The formalities associated with a quasi-judicial process will discourage rather than encourage public participation in the comprehensive planning process.

The *Puma* court seems to have ignored the fact that local government's responsibility to legislate land use policy does not change once a comprehensive plan has been adopted.<sup>139</sup> The same policy responsibility exists irrespective of the size of the parcel involved in the comprehensive plan amendment. Moreover, in adopting the Local Government Comprehensive Planning and Land Development Regulation Act, the Legislature recognized that changes would be needed for local land use policy to accommodate future growth.<sup>140</sup> A comprehensive plan is amended by ordinance. Regardless of the size of the parcel covered by the plan amendment, the amendment permanently changes the existing comprehensive plan and its new available uses affect the entire community. It is sufficiently general in nature to be considered an ordinance.<sup>141</sup> Therefore, there is no basis to treat a comprehensive plan amendment any differently than an amendment to any other existing ordinance of the municipality on a subject other than planning.

The *Jennings* holding only compounds and otherwise exasperates the *Snyder*, *Sunbelt Equities*, and *Puma* holdings. Read together, these cases stand for the proposition that the citizens of a municipality may not freely discuss the merits of a proposed rezoning or comprehensive plan amendment with a member of the governing body of that municipality unless the applicant of the rezoning or comprehensive plan amendment is present at the discussion. These cases, therefore, affect the fundamental right of private citizens to speak to their elected officials on matters of local concern in an

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*Snyder*, 595 So. 2d at 81. This has increased and shifted the burden of proof for municipalities. It is expected that this will also inhibit discretion in municipal decisions.

137. See *Sunbelt Equities*, 619 So. 2d at 996.

138. FLA. STAT. § 163.3181(1) (1991).

139. See *Puma*, 616 So. 2d at 190.

140. FLA. STAT. § 163.3181 (1991); FLA. STAT. §§ 163.184-163.189 (Supp. 1992).

141. Florida law defines an ordinance as "an official legislative action of a governing body which action is a regulation of a general and permanent nature and enforceable as law." FLA. STAT. § 166.041(1)(a) (1991).

informal manner. Some residents, due to work schedules, child care obligations, and the like, are unable to attend a formal hearing, yet they see their elected officials in the course of routine, day-to-day activities. Thus, the informal contact may be the only communication option available. These cases substantially chill the ability of residents to freely discuss the issues that affect the future of their municipality. Nor, can this be reconciled with the Legislature's requirement that public participation in the comprehensive planning process be encouraged to the maximum extent possible. Clearly, municipal governmental decision-making should not be so stilted.

Home rule authority is limited additionally by the court's adoption of the clear and convincing standard as the city's burden to maintain the property's current status once the applicant shows consistency with the municipality's comprehensive plan. The clear and convincing standard is a much higher standard than generally accorded a legislative act. Under this new higher standard, a municipality must show the reasonableness of its decision while supporting that decision with substantial, specific findings of fact, whereas a municipality enjoys greater flexibility in its decision-making for other legislative acts. It is incomprehensible that a higher burden be required to maintain the status quo than that required of the applicant in requesting a change via a comprehensive plan amendment or rezoning under *Snyder* and its progeny.

The inconsistencies among these cases have left municipal governments guessing as to the status of their home rule powers. Hopefully, the Florida Supreme Court will soon bring some semblance of order to this area of law while permitting the municipalities and their citizens to continue to exercise the home rule powers they have come to enjoy.<sup>142</sup> The governing body of a municipality must have every opportunity to balance local interests in reaching its ultimate decision. Municipalities, pursuant to their home rule powers, are in the best position to conduct the necessary analysis and balance the interests of the community and the interests of the landowner when making development decisions that affect the community. This historical prerogative of municipal government must not be preempted by the courts.

#### F. Agency Rules

Probably the most eminent threat to municipal home rule today is the adoption and implementation of state agency rules. Activities are increasingly regulated by state agencies. Municipalities have borne the brunt of

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142. See generally *Puma*, 616 So. 2d at 190; *Snyder*, 595 So. 2d at 65.

the state's regulatory activism, again at the expense of home rule authority. Between 1975 and 1991, agencies, on the average, proposed approximately 4,250 rules per year. The state's Department of Community Affairs alone has averaged some 168 proposed rules per year during the same period; the state's Department of Environmental Regulation, approximately 250 a year.<sup>143</sup> In 1983, agencies noticed approximately 3,500 proposed rules; by 1992, over 7,000 proposed agency rules were noticed.<sup>144</sup>

Even more evident of the proliferation of rules is the growth rate of Florida's Administrative Code. It is estimated that the code is increasing by approximately 1,000 pages per year.<sup>145</sup> Since 1986, the code has been increased by eight entire volumes!<sup>146</sup>

A wholly uncoded body of law also affects municipal home rule authority.<sup>147</sup> Agency interpretations and directives, which form the informal policy of the agency, are often unknown to the outsider.<sup>148</sup> Thus, the applicant can be "blind-sided" when trying to comply in good-faith because this informal policy is often the most difficult information to obtain prior to entering the formal process. Many municipalities submitting comprehensive plans found that their submission ran afoul of these informal interpretations. This situation "is created by state law and it can only be changed by state law."<sup>149</sup>

The collision between agency rulemaking authority and municipal home rule arises primarily as a result of the substantial deference courts have shown to both state agencies and municipalities. On the one hand, the courts have repeatedly recognized the vast breath of municipal home rule authority.<sup>150</sup> Broad municipal authority to manage local affairs is explicit in the Florida Constitution and chapter 166 of the Florida Laws. On the other hand:

The well recognized general rule is that agencies are to be accorded wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies'

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143. JT. ADMIN. PROCS. COMM. ANNUAL REPORT (1992).

144. JT. ADMIN. PROCS. COMM. OVERVIEW OF THE ADMINISTRATIVE PROCEDURES ACT (1992).

145. Philip Longman, *The Red Tape Tax*, FLA. TREND 31, 33 (Aug. 1993).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Gaines v. City of Orlando*, 450 So. 2d 1174, 1182 (Fla. 5th Dist. Ct. App. 1984).

150. *Nye*, 608 So. 2d at 15; *City of Boca Raton*, 595 So. 2d at 25; *State v. City of Sunrise*, 354 So. 2d 1206, 1208 (Fla. 1978).

general statutory duties . . . . An agency's construction of the statute it administers is to be entitled to great weight and is not to be overturned unless clearly erroneous . . . .<sup>151</sup>

Thus, the party challenging an agency rule bears a heavy burden.<sup>152</sup>

At least one court has gone so far as to essentially label agency rulemaking authority a form of legislative authority. "Indeed, the principle applied in rule challenge proceedings that an agency's interpretation of a statute need not be the sole possible interpretation, or even the most desirable one but need only be within the range of possible interpretations. . . ."<sup>153</sup> This broad range of authority closely resembles the deference accorded legislative enactments under the rational basis test. Such legislation, or rule as the case may be, will therefore not generally be disturbed absent a finding of arbitrariness or capriciousness.<sup>154</sup>

The courts appear to have had some trouble in reconciling the broad home rule authority granted municipalities and the broad rulemaking authority granted state agencies. In *Florida League of Cities, Inc. v. Department of Insurance & Treasurer*,<sup>155</sup> the Department sought, by rule, to apply various provisions of section 175 and section 185 of the Florida Statutes to certain local municipal fire and police officer pension plans. The appellants argued the proposed rules unlawfully preempted municipal control over local plans because there was no expression of preemption stated in the relevant statutes.<sup>156</sup> The court held the Department could not, by rule, apply the subject statutory provisions to the plans because there was no explicit language in the statutes expressly permitting the Department to apply the provisions to the plans.<sup>157</sup> In doing so, the court implicitly recognized that something more than an agency's traditional rulemaking authority was necessary when agencies were adopting rules that applied to

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151. *Department of Professional Reg., Bd. of Medical Examiners v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st Dist. Ct. App. 1984) (emphasis in the original).

152. The challenger must show that the agency exceeded its authority, the rule requirements are not reasonably related to the stated legislative ends, and that the requirements are arbitrary and capricious. *Grove Isle, Ltd. v. State Dep't of Env'tl. Reg.*, 454 So. 2d 571, 573-75 (Fla. 1st Dist. Ct. App. 1984).

153. *Florida League of Cities, Inc. v. Department of Env'tl. Reg.*, 603 So. 2d 1363, 1369 (Fla. 1st Dist. Ct. App. 1992) (citations omitted).

154. *Grove Isle*, 454 So. 2d at 573.

155. 540 So. 2d 850, 852 (Fla. 1st Dist. Ct. App. 1989).

156. *Id.* at 855.

157. *Id.* at 869.

municipal activities.<sup>158</sup>

On the other hand, in *Florida League of Cities, Inc. v. Department of Environmental Regulation*,<sup>159</sup> the appellants challenged rules that made a municipal wastewater treatment facility financially liable for the proper disposal of its domestic wastewater residuals by an independent third party unless the third party legally agreed in writing to accept responsibility for proper disposal.<sup>160</sup> Appellants sought to invalidate the rules in part on the grounds the Department had no express legislative authority to make the municipality financially responsible for the wrongful acts of independent third parties in disposing of the residuals. In upholding the rule, the court applied the traditional principle of agency rulemaking authority and held that the Department presumptively had ample authority to enact the rules because its enabling statute "simply states that an agency may make such rules and regulations as may be necessary to carry out the provision of this act . . ."<sup>161</sup>

It's extremely hard to envision the State Legislature, by including such "boilerplate" language, ever contemplated that state agencies, with the help of the courts, could or would reach out and use this language to substantially erode the constitutional and statutory authority of municipalities to manage local affairs. In fact, such language is often included by the Legislature as an afterthought primarily because it recognizes that the Legislature could hardly specify every minute action contemplated by the statute or each statute would be several hundred pages long. However, the language clearly is not meant to be authority for the state agency to engage in micro-management and delve into every minuscule action taken by a municipality.

If in fact the latter court's view of agency rulemaking authority ultimately prevails, agencies will be able to increasingly dictate the activities of municipalities. Municipal home rule in Florida would theoretically exist but would be void of any substance. Many state agencies have adopted rules that then could apply, to one degree or another, to most municipal activities.

Such overreaching by state agencies would seriously undermine the ability for local decisions to be made based upon the unique characteristics of a particular area. Florida is too diverse in its typography, environment, demographics, and the like, to apply the homogenized approaches often

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158. *Id.*

159. 603 So. 2d 1363 (Fla. 1st Dist. Ct. App. 1992) (citations omitted).

160. *Id.*

161. *Id.* at 1369.

inherent in agency rule-making. If daily local municipal governance decisions can be overridden by a non-elected entity, then municipal home rule authority would be but a shell.

#### IV. FUTURE MUNICIPAL ISSUES

It is ironic that at the same time the Legislature and the courts have been looking to curtail home rule powers, the municipalities are looking to expand them. A significant event in the area of municipal home rule occurred in November, 1990, when Florida's voters approved the "Mandates Amendment".<sup>162</sup> A mandate is a obligatory requirement by one governmental entity of another separate governmental entity to perform an activity, provide a service, facility, or benefit, or erodes the local tax base.<sup>163</sup> It is an unfunded mandate to the extent costs are imposed on the other governmental entity. Municipalities cannot respond to the needs and conveniences of their citizens if municipal revenues are diverted to pay for unfunded programs mandated by the state.<sup>164</sup>

Under this amendment, counties and municipalities are excused from complying with state laws that require the expenditure of county or municipal funds unless the state law fulfills an important state interest and the law meets one of five exceptions.<sup>165</sup> This amendment also requires a two thirds vote of both houses for the State Legislature to enact, amend, or repeal any general law, if the anticipated effect of the Legislature's action would reduce the authority of counties or municipalities to raise revenues in the aggregate, as that authority existed on February 1, 1989, or would reduce the percentage of state tax revenues shared with the counties or municipalities as an aggregate on February 1, 1989.<sup>166</sup>

The following laws are exempted from the purview of the amendment: laws adopted to fund existing pension benefits; criminal laws; election laws;

162. See FLA. CONST. art. VII, § 18 (amended 1990).

163. 1993 INTERGOVERNMENTAL IMPACT REPORT, Jt. Advis. Council on Intergovtl Rel. (draft edition) (Aug. 1993).

164. *What Amendment #3 Will Do For Florida*, QUALITY CITIES 5, (June 1990).

165. The five exceptions are: (1) the law is passed by at least a two-thirds vote of the membership of both the House and Senate; (2) sufficient state funds have been appropriated to fund the program; (3) the state authorizes the counties or cities to enact a sufficient funding source for the program; (4) the law applies to all persons similarly situated; or (5) the law is required to comply with a federal mandate or to maintain eligibility for federal entitlement programs. FLA. CONST. art. VII, § 18 (amended 1990).

166. *Id.*

general and special appropriations acts; reauthorization laws; laws creating, modifying, or repealing non-criminal infractions; and laws having an insignificant fiscal impact.<sup>167</sup>

While a careful reading of the Mandates Amendment reveals a number of ambiguities, and the Amendment to date has not been judicially construed, it's clear that it has had its intended affect. In 1983, there were twenty-eight fiscally significant<sup>168</sup> state mandates for local governments; by 1987, the number had risen to fifty.<sup>169</sup> In 1992, the number of state mandates on local governments had dropped to thirty-two, and most, at least colorably, fell within the Amendment's exemptions.<sup>170</sup> However, as of the 1993 legislative session, it appears that the state legislators have found the loophole in this amendment, because forty-five of the laws passed during the 1993 session contained mandates for local governments.<sup>171</sup> Of those forty-five new mandates, twenty-one fell under amendment's exemption provisions and three were exceptions.<sup>172</sup> The estimated statewide fiscal impact on local governments for only six of these mandates is \$5,243,642.<sup>173</sup>

The Amendment has also had a substantial impact on the legislature's general operating procedures. Procedural changes have subtly discouraged the introduction and passage of legislation that likely falls within the purview of the Amendment. Then Senate President Gwen Margolis and House Speaker T. K. Wetherell issued a set of guidelines on March 21, 1993 which both houses have used to date to determine whether proposed legislation falls within the purview of the Mandates Amendment. Generally, the guidelines require a relatively extensive analysis of each general bill to determine if it will trigger the Mandates Amendment. All staff analyses of proposed general bills must specifically disclose the extent if any to which the Amendment applies to proposed general bills. Finally, under the Senate's Rules, any proposed general bill that might trigger the Mandates Amendment must be referred to and heard by the Senate Committee on

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167. *Id.*

168. According to the Florida House and Senate guidelines, insignificant is defined as an amount not exceeding ten cents times the average statewide population for the applicable fiscal year. Cover Memorandum, Senate President Gwen Margolis and House Speaker T.K. Wetherall, *County and Municipal Mandates Analysis* (Mar. 21, 1991).

169. Jt. Advis. Council on Intergovtl Rel., *1988 Catalogue of State Mandates XV* (Oct. 1988).

170. Jt. Advis. Council on Intergovtl Rel., *1991 Report on Mandates and Measures Affecting Local Gov't Fiscal Capacity* 3, 8-11 (1992 Supp. Oct. 1993).

171. 1993 INTERGOVERNMENTAL IMPACT REPORT, *supra* note 163 at 5.

172. *Id.*

173. *Id.* at 16.



Community Affairs.<sup>174</sup> Even on good days, the state legislative process is generally not conducive to passing bills: if a proposed bill gets caught in the legislative apparatus established to ferret out potential state mandates, its passage becomes very unlikely.

Municipalities are also expected to lobby for a federal "no unfunded mandates" provision. Increasing federal mandates also affect municipal revenue sources due to the exception provision in Florida's mandates amendment for laws required to comply with a federal mandate.<sup>175</sup> Thus, a "spillover" effect occurs when the state is forced to adopt a law to implement the federal act. For example, Florida's law implementing the federal Americans with Disabilities Act ("ADA") imposed additional parking space and public transportation accessibility requirements on municipalities. More state mandates under this exception can be expected with the implementation of the National Voter Registration Act, the Federal Highway Administration's interpretation of the Intermodal Surface Transportation Enhancement Act ("ISTEA"), and the Environmental Protection Agency's interpretation of the Clean Air and Clean Water Acts.

Another emerging area of municipal concern is diminishing municipal revenue sources due to state imposed caps or restrictions on funding sources.<sup>176</sup> While municipalities have the home rule authority to levy fees to fund various services to its citizens,<sup>177</sup> they have no home rule authority to tax.<sup>178</sup> Recognizing the need for greater diversity and flexibility in the development and implementation of appropriate municipal revenue streams, municipalities have conscientiously lobbied the Legislature for fiscal home rule over the past two years. During the 1993 Legislative Session, SJR 78 (Dudley) and HJR 445 (Goode) proposed an amendment to Florida's Constitution, commonly known as "Voter Control of City Taxes".<sup>179</sup> Under these proposals, a municipality would be permitted, upon the adoption of a charter amendment by referendum of its voters, to levy virtually any tax authorized in the charter amendment, regardless of whether the tax was authorized by general law. Municipalities would not have been permitted to levy estate or inheritance taxes, personal or corporate income taxes, or tangible personal property sales taxes under the proposed amend-

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174. FLA. S. RULE 4.8 (1992-1994).

175. FLA. CONST. art. VII, § 18 (amended 1990).

176. Ken Small, *The State of Cities*, QUALITY CITIES, 18 (June/July, 1992).

177. *Contractors' & Builders' Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976); *City of Boca Raton*, 595 So. 2d at 25.

178. *City of Tampa v. Birdsong Motors*, 261 So. 2d 1 (Fla. 1972).

179. Fla. SJR 78 (1993); Fla. HJR 445 (1993).

ment.<sup>180</sup> However, these proposals would have eliminated the state Legislature's exclusive constitutional authority over the area of municipal non-ad valorem taxing authority. More importantly, they would have returned local decision making on a vital component of municipal government, financing, to the local level.<sup>181</sup> The proposed amendment is sorely needed because Florida's municipalities, without adequate authority to raise sufficient revenues, have found it difficult to respond in a timely manner to the needs of their residents. While these proposals failed to pass the Legislature so far, like proposals are expected to surface in future legislative sessions because of the severe revenue shortfalls municipalities are expected to encounter in the future.

## V. CONCLUSION

Municipal home rule authority undoubtedly has many advantages. State involvement with local issues should be minimized. Individual municipalities are better situated to determine the needs and conveniences of their citizens and legislate accordingly because local government is the government closest to the people served. With full responsibility and accountability resting upon the citizens, there is a significant opportunity for education about the principles and methods of municipal government and involvement in the development of common community interests and solutions for local concerns.

State government is simply unable to provide the type of open participatory forum inherent in municipal government. If municipalities are free to manage their own affairs, they can respond more promptly to the needs and conveniences of their citizens, and deal quickly with new problems as they arise. Strengthening home rule authority will relieve the State Legislature of the micro-management responsibility for municipal government. Then and only then will the state truly be free to concentrate on the pressing affairs of state.<sup>182</sup>

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180. Tell Me More About Voter Control of City Taxes, *QUALITY CITIES*, 27 (Mar. 1992).

181. Sharon G. Berrian, *Why We Must Have Voter Control of City Taxes*, *QUALITY CITIES*, 4 (May 1992).

182. 1 MCQUILLEN MUNICIPAL CORPORATIONS § 1.43 (3d ed. 1987).

# Shoot the Patient or Find the Cure: The Florida Constitutional Requirement that Increases in Public Employee Pensions be Funded on a Sound Actuarial Basis

Richard A. Sicking\*

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### I. HISTORY OF THE CONSTITUTIONAL PROVISION

Section 14 of article X is entitled "State retirement systems benefit changes."<sup>1</sup> It provides:

A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.<sup>2</sup>

This peculiar constitutional provision first appeared on April 8, 1975, when it was introduced as House Joint Resolution 291 in the Florida House of Representatives by Jerry G. Melvin of Fort Walton Beach.<sup>3</sup> On that day,

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\* Richard A. Sicking practices law in Miami, Florida. He is general counsel for the Florida Professional Firefighters and represented this organization as an intervenor in *Florida Ass'n of Counties, Inc. v. Department of Admin., Div. of Retirement*, 580 So. 2d 641 (Fla. 1st Dist. Ct. App. 1991), *aff'd*, 595 So. 2d 42 (Fla. 1992). Mr. Sicking received his undergraduate education at the University of Michigan and the University of Miami. He received his Juris Doctor degree from the University of Miami in 1963.

1. FLA. CONST. art. X, § 14.

2. *Id.*

3. FLA. H.R. JOUR. 34, 177, 445 (Reg. Sess. 1975).

the resolution was read for the first time and referred to the Committees on Retirement, Personnel & Claims, and Appropriations, which later reported it favorably.<sup>4</sup>

The House passed the bill, by a vote of 110 to 1, and sent it to the Senate, which adopted the measure by a vote of 29 to 7.<sup>5</sup> The bill was then submitted for approval by the voters at the general election scheduled for November 1976.<sup>6</sup> The proposed amendment was described on the ballot as follows: "Proposing to add Section 14 to Article X of the State Constitution to provide that increases in the benefits payable under any governmental supported retirement system after January 1, 1977, be fully funded by the governmental unit."<sup>7</sup>

In response to a question submitted by Representative Barry Richard, the Assistant Attorney General, David K. Miller, rendered opinion 78-34.<sup>8</sup> He concluded that the words "fully funded" appearing on the ballot proposal cannot mean that a system is required to maintain reserves sufficient to cover all potential claims to a mathematical certainty. Rather, it means that "a system is required to maintain reserves sufficient to cover its probable claims, as prudently determined with reference to risk based on statistical and demographic computations."<sup>9</sup> Therefore, the phrase "fully funded" on the ballot question "is not substantially different in meaning from the constitutional . . . [provision requiring funding on a] sound actuarial basis."<sup>10</sup>

This constitutional provision applies to all Florida governmental units, which includes local governmental units, as well as the state itself.<sup>11</sup> This section of the Florida Constitution does not require that benefits provided by law, prior to January 1, 1977, be funded on a sound actuarial basis, only that increases in benefits after that date be so funded.<sup>12</sup> There is, however, a requirement elsewhere in the law that benefits existing prior to January 1, 1977 be funded on a sound actuarial basis,<sup>13</sup> but this is required by statute, not by the Florida Constitution.

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4. *Id.*

5. *Id.* at 597; FLA. S. JOUR. 457-58 (Reg. Sess. 1975).

6. *See* Fla. HJR No. 291C (1975); FLA. S. JOUR. 457 (Reg. Sess. 1975).

7. Fla. HJR 291 (1975); FLA. S. JOUR. 457 (Reg. Sess. 1975).

8. 1978 FLA. ATT'Y GEN. ANN. REP. 78.

9. *Id.*

10. *Id.*

11. *See* FLA. CONST. art. X, § 14.

12. *See id.*

13. FLA. STAT. § 112.64(2), (3) (1991).

## II. STATUTORY IMPLEMENTATION

In 1978, Florida enacted part VII of chapter 112 of the Florida Statutes, which is entitled "ACTUARIAL SOUNDNESS OF RETIREMENT SYSTEMS."<sup>14</sup> The statute has the short title "Florida Protection of Public Employee Retirement Benefits Act."<sup>15</sup> Section 112.61 of the Florida Statutes, contains a statement of legislative intent which implements section 14 of article X of the state constitution.<sup>16</sup> The 1978 statute contained the following statement of legislative intent:

It is the intent of the Legislature in implementing the provisions of s. 14 of Art. X of the State Constitution, relating to governmental retirement systems, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits.<sup>17</sup>

In 1983, this statement of legislative intent was changed by amendment to add the following:

Inherent in this intent is the recognition that the pension liabilities attributable to the benefits promised public employees be fairly, orderly, and equitably funded by the current, as well as future, taxpayers. Accordingly, except as herein provided, it is the intent of this act to prohibit the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers. This act hereby establishes minimum standards for the operation and funding of public employee retirement systems and plans.<sup>18</sup>

The Employee Retirement Income Security Act of 1974 ("ERISA"), among other things, requires adequate pension funding by private employers.<sup>19</sup> ERISA was not imposed upon state or local governments. Thus, it was left to the state and local governments to enact appropriate provisions

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14. Ch. 78-170, §1, 1978 Fla. Laws 566 (codified at FLA. STAT. § 112.60-112.67 (1979)).

15. FLA. STAT. § 112.60 (1991).

16. *Id.* § 112.61.

17. FLA. STAT. § 112.61 (1979).

18. Ch. 83-37, § 1, 1983 Fla. Laws 105 (amending FLA. STAT. § 112.61 (1983)).

19. *See* 29 U.S.C. § 1001 (1988).

of their own.<sup>20</sup> Part VII of Florida Statutes chapter 112 applies to the state and to local governments, which had been exempted from the requirements of the federal statute.<sup>21</sup>

Part VII of Florida Statutes chapter 112 applies to any employee pension benefit plan supported in whole or in part by public funds.<sup>22</sup> Indeed, the statute specifically applies to the state for the Florida Retirement System.<sup>23</sup> This system includes those counties which are compulsory members, and municipalities and special districts which are voluntary members.<sup>24</sup>

Section 112.64(2) of the Florida Statutes provides that after October 1, 1980, a plan then in existence

shall be sufficient to meet the normal cost of the retirement system or plan and to amortize the unfunded liability, if any, within 40 years . . . For a retirement system or plan which . . . [came] into existence after October 1, 1980, the unfunded liability, if any, shall be amortized within 40 years of the first plan year.<sup>25</sup>

The Florida statute requires a plan to amortize any unfunded liability using acceptable actuarial cost methods, subject to the approval of the Division of Retirement.<sup>26</sup> Local governments are required to submit plans for approval by the Division of Retirement in a statement of an enrolled actuary.<sup>27</sup>

Part VII of chapter 112 of the Florida Statutes sets forth what are acceptable funding methods in an unusual fashion. The chapter incorporates by reference not only those methods provided for in ERISA, but also those permitted under regulations prescribed by the Secretary of the Treasury. Section 112.63(1) of the Florida Statutes, provides, "[t]he actuarial cost methods utilized for establishing the amount of the annual actuarial normal cost to support the promised benefits shall only be those methods approved

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20. *See id.* §§ 1002(32), 1003.

21. FLA. STAT. §§ 112.60-112.67 (1991); 29 U.S.C. §§ 1002(32), 1003 (1988).

22. *See* FLA. STAT. §§ 112.60-112.67 (1991).

23. *See id.* §§ 112.62, 112.625(5).

24. *See id.* §§ 112.62, 121.051.

25. *Id.* § 112.64(2), (3). A longer period of time is allowed to those systems already having a sound actuarial plan for amortization of unfunded liability. *Id.* § 112.64(2).

26. *See* FLA. STAT. § 112.63 (1991).

27. *See id.* § 112.63(1)(f). An "[e]nrolled actuary means an actuary who is enrolled under . . . [ERISA] and who is a member of the Society of Actuaries or the American Academy of Actuaries." *Id.* § 112.625(3).

in the Employee Retirement Income Security Act of 1974 and as permitted under regulations prescribed by the Secretary of the Treasury.”<sup>28</sup>

The methods approved in the Employee Retirement Income Security Act of 1974 are stated as follows: “Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method.”<sup>29</sup> It further provides that, “[t]he Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.”<sup>30</sup>

The Secretary of the Treasury has issued Treasury Regulation 1.412-(c)(3)-1 entitled “Reasonable funding methods in implementation of section 3(31) of ERISA.”<sup>31</sup> It describes acceptable and unacceptable actuarial cost methods.

In addition to requiring a plan of funding on a sound actuarial basis for any unfunded liability that existed on October 1, 1980 for amortization over 40 years,<sup>32</sup> part VII of chapter 112 implements article X, section 14 of the Florida Constitution with regard to increases in benefits by requiring a plan of funding over 30 years.<sup>33</sup>

### III. THE *TURLINGTON* CASE

The first case discussing the phrase “an increase in the benefits” is *Turlington v. Department of Administration, Division of Retirement*.<sup>34</sup> In *Turlington*, a taxpayer<sup>35</sup> challenged the validity of chapter 83-76, section 7, of the Laws of Florida. The law provided that an elected official covered by the Florida Retirement System (“FRS”), who was also employed in a non-elected position covered by FRS, could retire from the non-elected position while continuing employment in the elected office, but without

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28. *Id.* § 112.63(1).

29. 29 U.S.C. § 1002(31) (1988).

30. *Id.*

31. Treas. Reg. § 1.412(c)(3)-1 (1993).

32. FLA. STAT. § 112.64 (1991).

33. The statute provides: “The net increase, if any, in unfunded liability under the plan arising from significant plan amendments adopted, changes in actuarial assumptions, changes in funding methods, or actuarial gains or losses shall be amortized within 30 plan years.” *Id.* § 112.64(4).

34. 462 So. 2d 65 (Fla. 1st Dist. Ct. App. 1984).

35. The plaintiff was also the Commissioner of Education.

additional service credit.<sup>36</sup> The taxpayer contended that this violated article X, section 14 of the Florida Constitution because there was admittedly no actuarial study done regarding the possible effect of chapter 83-76, section 7 on FRS.<sup>37</sup>

The First District Court of Appeal held that section 7 of chapter 83-76 was not an increase in benefits. Hence, article X, section 14 was not involved. In dicta, the court said, "[t]he absence of an actuarial study does not, per se, render the statute invalid."<sup>38</sup>

This analysis was correct. Even if no actuarial study accompanied the legislation in question, it does not necessarily violate article X, section 14. It could still be demonstrated that no funding plan was required, or that the funding plan employed was on a sound actuarial basis.

*Turlington* did not really deal with an increase in benefits, but rather, it dealt with a change in the circumstances in which retirement can be taken. The case illustrates that article X, section 14 presents a different kind of question about a constitutional requirement. It is not a question of facial invalidity, or whether the enactment contains constitutionally impermissible language or provisions. Nor is it a question of being unconstitutional as applied in the sense that the legislative language produces an unconstitutional result for a particular person or group of persons. Rather, the question is whether the governmental body properly performed an act in connection with legislation increasing pension benefits for public employees. It is a new kind of constitutional question: Did the government fund the increase on a sound actuarial basis or provide a plan of such funding? The question for the courts is not what did the legislative body enact, but rather, what provision for funding on a sound actuarial basis did the legislative body make for that enactment. Having said this, the next question must be: What is the remedy for the failure to fund on a sound actuarial basis?

The term "funding on a sound actuarial basis" is not one of ordinary understanding.<sup>39</sup> Indeed, part VII of chapter 112 requires that the funding plan be accompanied by "[a] statement by the enrolled actuary that the report is complete and accurate and *that in his opinion* the techniques and assumptions used are reasonable and meet the requirements and intent of

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36. Ch. 83-76, § 7, 1983 Fla. Laws 247, 251 (amending FLA. STAT. § 121.091(9)(b)7 (1983)). Chapter 83-76 was later repealed and modified by Florida Laws chapter 84-11, section 1. *Turlington*, 462 So. 2d at 66 n.1.

37. *Turlington*, 462 So. 2d at 66-67.

38. *Id.* at 67.

39. Florida Ass'n of Counties v. Department of Admin., Div. of Retirement, 580 So. 2d 641, 643-44 (Fla. 1st Dist. Ct. App. 1991); *aff'd*, 595 So. 2d 42 (Fla. 1992).



this act.”<sup>40</sup> This means that whether or not the legislative body performed the act (funding on a sound actuarial basis), which is constitutionally required in connection with legislation increasing pension benefits for public employees, is a question of opinion to be answered by expert witnesses. This is an unusual test of a constitutional requirement.

#### IV. THE *FLORIDA ASS'N OF COUNTIES* CASE

*Florida Ass'n of Counties v. Department of Administration, Division of Retirement*<sup>41</sup> clearly illustrates this constitutional requirement. In 1970, Florida consolidated its retirement benefits into FRS.<sup>42</sup> FRS contains a “special risk” category of retirement, which is for police officers, firefighters, and correction officers.<sup>43</sup> The statute provides that they have an earlier retirement date than other employees.<sup>44</sup> When chapter 112 of the Florida Statutes was originally enacted in 1970, employees in the “special risk” category had a two percent per year service credit, which was generally a higher benefit than other employees received.<sup>45</sup> The retirement benefit was calculated by a percent per year of creditable service times average monthly compensation.<sup>46</sup> The service credit was increased to three percent per year for service after September 30, 1974.<sup>47</sup> Effective October 1, 1978, the Legislature reduced the three percent service credit to two percent.<sup>48</sup>

In *Florida Sheriffs Ass'n v. Department of Administration*,<sup>49</sup> the Supreme Court of Florida held that the reduction was valid.<sup>50</sup> The court stated that a retired employee has a vested right in the amount of his pension and a subsequent enactment could not change that. However, active employees had no such vested right.<sup>51</sup> Therefore, the Legislature could change benefits for active employees, even reduce them, for given years of

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40. FLA. STAT. § 112.63(1)(f) (1991) (emphasis added).

41. 580 So. 2d at 641.

42. FLA. STAT. §§ 121.011(2), 121.045 (1991).

43. *Id.* § 121.0515.

44. *Id.* § 121.021(29).

45. *Id.* § 121.091(1)(a).

46. *Id.* § 121.091(1).

47. FLA. STAT. § 121.091(1)(a)2 (1991).

48. Ch. 78-308, §6, 1978 Fla. Laws 875, 883 (codified at FLA. STAT. § 121.091 (1)(a)3 (1979)).

49. 408 So. 2d 1033 (Fla. 1981).

50. *Id.* at 1037.

51. *Id.* at 1036.

service prior to retirement.<sup>52</sup>

In 1988, there was a proposal to restore the service credit from two percent per year to three percent.<sup>53</sup> It was considered by the Senate as the Committee Substitute for Senate Bill 150.<sup>54</sup> The original bill would have increased the service credit from two percent per year to three percent immediately, and it would have required immediate funding for the increase by the state, counties, and cities involved.<sup>55</sup>

On June 6, 1988, the Committee Substitute for Senate Bill 150 came to the floor of the Senate.<sup>56</sup> Senator Hollingsworth offered an amendment which would increase the service credit from two percent per year to three percent over a five year period, together with a five year phase-in of contributions.<sup>57</sup> Senator Girardeau raised a point of order that pursuant to Senate Rule 3.13, the amendment was out of order, since the actuarial report was for an increase from two percent per year to three percent in the same year, not phased-in over five years.<sup>58</sup> The Chair requested Senator Baron and Senator Langley to make a recommendation to the Senate on the point of order.<sup>59</sup> Senator Baron reported:

The question is whether Senator Hollingsworth's amendment complies with the requirement that changes to the state retirement system be studied by an actuary. An actuarial study was presented to the Senate in April of [1988] which studied the increase in special risk retirement from 2 percent per year of service to 3 percent per year of service. The increased employer contribution which was determined to be actuarially required for that change was 7.4 percent. Senator Hollingsworth's amendment divides both the increased benefit, and the increased employer contribution into five portions. The amendment is a modification of the original proposal, the basis of the study, and therefore protects the soundness of the Florida Retirement System, which is the underlying purpose of the rule. Therefore, the point is not well taken. The presiding officer ruled the point was not well taken.<sup>60</sup>

The amendment, which was adopted June 7, 1988, provided for the

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52. *Id.*

53. FLA. S. JOUR. 1083, 1136 (Reg. Sess. 1988) (CS for SB 150).

54. *Id.* at 1136.

55. *See id.* at 1135-36.

56. *Id.* at 1136.

57. *Id.* at 1034 (amendment 1).

58. FLA. S. JOUR. 1035, 1083 (Reg. Sess. 1988) (point of order).

59. *Id.* at 1035.

60. *Id.* at 1083 (ruling on the point of order by Senator Girardeau on Rule 3.13).

“phasing-in” of the increased benefit, and the funding of it, over a five-year period.<sup>61</sup> Senator Hair, the Chairman of the Senate Committee on Personnel, Retirement and Collective Bargaining, explained his vote in regard to this amendment:

The amendment offered by Senator Hollingsworth would “phase in” this increased benefit over a five-year period which would have the effect of reducing the immediate fiscal impact upon Special Risk employers. Nonetheless, the ultimate fiscal impact associated with increasing the retirement benefit of Special Risk members is still present, albeit spread over a longer period of time. I am further concerned about the precedent of “phasing in” new benefits; this is a concept never tried in the FRS before and one that is specifically not recommended by the FRSs’ actuaries . . . .<sup>62</sup>

The bill passed in the Senate, and the House concurred.<sup>63</sup> The measure became law as chapter 88-238 of the Laws of Florida.<sup>64</sup>

Following enactment, the Florida Association of Counties and the Florida League of Cities, along with two taxpayers, brought suit in Leon County against the Department of Administration, Division of Retirement. They sought a declaration that chapter 88-238 was:

an improper exercise of the state’s taxing and spending authority because it funded the costs of increased benefits to special risk members, composed of fire fighters and law enforcement officers, by assertedly shifting the burdens [of payment] from current to future taxpayers in violation of article X, section 14 of the state constitution.<sup>65</sup>

The Florida Police Benevolent Association and the Florida Professional Firefighters intervened as defendants,<sup>66</sup> and after the circuit court held that the statute did not violate the Florida Constitution, the plaintiffs appealed.<sup>67</sup> The First District Court of Appeal affirmed the decision of the circuit

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61. *Id.* at 1136.

62. *Id.*

63. FLA. S. JOUR. 1136, 1272 (Reg. Sess. 1988).

64. Ch. 88-238, § 1, 1988 Fla. Laws 1327 (codified at FLA. STAT. § 121.071 (1989)).

65. Florida Ass’n of Counties v. Department of Admin., Div. of Retirement, 580 So. 2d 641, 643 (Fla. 1st Dist. Ct. App. 1991), *aff’d*, 595 So. 2d 42 (Fla. 1992).

66. *Id.*

67. *Id.*

court.<sup>68</sup> On further review, the Supreme Court of Florida approved of and adopted the decision of the First District Court of Appeal.<sup>69</sup>

The First District Court of Appeal described the phase-in of contributions and benefits as follows:

<u>Period</u>	<u>% Increase in Contributions</u>	<u>% Increase in Benefits</u>
1989	1.6	2.2
1990	3.2	2.4
1991	4.8	2.6
1992	6.4	2.8
1993+	8.0	3.0 <sup>70</sup>

The First District Court of Appeal stated that it found no case which had definitively considered the meaning of the phrase "sound actuarial basis."<sup>71</sup> It further noted that after hearing a diversity of expert opinions at the trial that indicated the phrase "sound actuarial basis" is not precisely defined in actuarial science, the trial court had accepted a consensus definition that "a retirement program must be funded in such a way that the retirement fund is able to meet its continuing obligations as and when they mature."<sup>72</sup> The trial court held that chapter 88-238 met that test,<sup>73</sup> and the Supreme Court of Florida later approved of the definition adopted by the trial judge.<sup>74</sup>

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68. *Id.* at 646.

69. *Florida Ass'n of Counties*, 595 So. 2d at 44.

70. *Florida Ass'n of Counties*, 580 So. 2d at 643 (footnotes omitted). The dates for the phase-in after 1989, as described in chapter 88-238 of the Laws of Florida, were impossible. This was corrected in a subsequent revisor's ("glitch") bill, chapter 89-220 of the Laws of Florida, which now appears in Florida Statute, sections 121.071 and 121.091. The First District Court of Appeal did not consider this error significant: "Appellants also assert that technical flaws in the original legislative bills . . . all render the plan unsound, and therefore constitutionally deficient. Assuming the validity of appellants' criticisms, the record does not convincingly support the conclusion that asserted defects, if corrected, are constitutionally mandated." *Id.* at 645.

71. *Id.* at 644.

72. *Id.*

73. *Id.*

74. *Florida Ass'n of Counties*, 595 So.2d at 43-44. Approving Judge Hall's definition, the court opined:

First, we have never addressed the meaning of the phrase "sound actuarial basis," as contained in article X, section 14. We agree with the trial court and district court of appeal that "sound actuarial basis" means that "a retirement program must be funded in such a way that the retirement fund is able to meet

The district court observed that the phase-in scheme selected by the Legislature clearly departed from plans used to fund benefit increases in the past. Customarily, increases in benefits have been paid for by amortizing the associated costs at a single rate over a thirty year period. The appellants conceded that article X, section 14 did not dictate such a plan.<sup>75</sup>

The appellants argued that the Legislature determined the controlling meaning of article X, section 14 by its statement of legislative intent contained in chapter 83-37 of the Laws of Florida, the 1983 amendment to section 112.61 of the Florida Statutes.<sup>76</sup> The First District Court of Appeal described that amendment in the following manner:

The legislature there declared that liabilities required to fund public retirement system benefits must be funded equitably by current and future taxpayers alike, and expressly prohibited the "transfer to future taxpayers [of] any portion of the costs which may reasonably have been expected to be paid by the current taxpayers."<sup>77</sup>

In addition, the appellants argued that the legislative interpretation of article X, section 14 contained in chapter 83-37 is entitled to a presumption of correctness. The district court of appeal concluded that, under the circumstances, chapter 83-37 is not entitled to such presumptive weight.<sup>78</sup> Those "circumstances," the court explained, are that article X, section 14 was adopted in 1976. The 1978 statement of legislative intent contained in chapter 78-170 "merely required that governmental retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits."<sup>79</sup> The court pointed out that "[n]ot until 1983 did the legislature express its intent in implementing the provisions of Article X, section 14 to require that a plan be equitably funded by the current, as well as future, taxpayers."<sup>80</sup> The court reasoned that chapter 78-170 of the Laws of Florida is more contemporaneous with the constitutional provision than chapter 83-37. Therefore, chapter 83-37 is not entitled to any presumptive weight that it is

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its continuing obligations as and when they mature."

*Id.* (quoting *Florida Ass'n of Counties*, 580 So. 2d at 644).

75. *Florida Ass'n of Counties*, 580 So. 2d at 644 n.7.

76. *Id.* at 644.

77. *Id.*

78. *Id.*

79. *Id.* at n.9.

80. *Florida Ass'n of Counties*, 580 So. 2d at 644 n.9.

a contemporaneous legislative interpretation of article X, section 14.<sup>81</sup>

The appellants also advanced a statutory argument that chapter 88-238 conflicted with the statement of intent contained in chapter 83-37. The First District Court of Appeal decided that a "sounder position is to harmonize the legislature's intent for the amendment with its intent for the original law."<sup>82</sup> Thus, rather than prohibiting the taxing of future taxpayers, chapter 83-37 requires that costs associated with chapter 88-238 are passed on to future taxpayers in a reasonable manner.<sup>83</sup> The court noted that a consulting actuary had testified that the amendment assessed the cost to the appropriate generation of taxpayers; "those who are being served by the generation of special risk members who are receiving the particular benefit."<sup>84</sup>

This is an example of harmonizing one provision of the Florida Statutes with another. The court's obligation to do that does not apply to any conflict between the Florida Statutes and an ordinance of municipal government.<sup>85</sup> Whether local government could, by ordinance, have accomplished the same phase-in of benefits and contributions poses a different question. It should be noted that article X, section 14 is now to be read in conjunction with article VII, section 18 of the Florida Constitution, adopted in 1990, which imposes limitations upon the Legislature to pass laws requiring counties or municipalities to spend funds or limit their ability to raise revenue. Article VII, section 18(d) specifically provides, "[l]aws adopted to require funding of pension benefits existing on the effective date of this section . . . are exempt from the requirements of this section."<sup>86</sup>

*Florida Ass'n of Counties* was significant because it involved not only the state and all the counties in Florida, but the cities that were voluntary members of the State Retirement System as well. It also involved all law enforcement officers, firefighters, and correction officers employed by the state, the counties, and the city members of FRS. Quite plainly, it involved a large number of people, many governmental units, and large sums of money.

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81. *Id.*

82. *Id.* at 645.

83. *Id.*

84. *Id.*

85. See FLA. STAT. § 166.021(3)(a) (1987); *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed*, 471 U.S. 1096 (1985).

86. FLA. CONST. art. VII, § 18(d).

V. THE *BRANCA* CASE

In contrast, *Branca v. City of Miramar*<sup>87</sup> involved one man and a small city. Frank Branca was the mayor of the City of Miramar for nearly sixteen consecutive years.<sup>88</sup> Section 112.048 of the Florida Statutes, which predates article X, section 14 of the Florida Constitution, requires that cities provide a retirement benefit of half-pay to elective officers who retire voluntarily after holding office in that city twenty consecutive years.<sup>89</sup> No retirement benefits are required for officials who serve less than twenty consecutive years.<sup>90</sup>

In 1988, the City of Miramar passed Ordinance 88-16 which created a pension plan.<sup>91</sup> Under the ordinance, “[a]n elected official retiring after twenty years would receive annually [fifty] percent of his or her average annual salary for the preceding five years.”<sup>92</sup> The ordinance also provided for reduced benefits in the event of earlier retirement,<sup>93</sup> and for the elected official to contribute five percent of his or her salary. The employee’s pension benefits were to be paid first from employee contributions, and once those were exhausted, the balance was to be paid from the city’s general funds.<sup>94</sup>

In 1989, Mayor Branca took an early retirement under this ordinance at the reduced benefit.<sup>95</sup> His own contributions were exhausted two months after he retired,<sup>96</sup> and thereafter, the pension benefits were paid to him by the city.<sup>97</sup>

On May 15, 1989, a new City Commission repealed the ordinance, but payments were continued to Mayor Branca from a budget item entitled “disputed benefits payable.”<sup>98</sup> The City Clerk submitted the ordinance to the Florida Department of Administration, Division of Retirement for review. The Division’s counsel gave an opinion that the ordinance violated article X, section 14 of the Florida Constitution and part VII of chapter 112

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87. 602 So. 2d 1374 (Fla. 4th Dist. Ct. App. 1992).

88. *Id.* at 1376 n.5.

89. *Id.* at 1376.

90. *Id.*

91. *See id.* at 1375.

92. *Branca*, 602 So. 2d at 1375 n.1.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Branca*, 602 So. 2d at 1375.

98. *Id.*

of the Florida Statutes.<sup>99</sup> Upon receipt of the Division's legal opinion, the city filed suit seeking a declaratory judgment that Ordinance 88-16 was unconstitutional.<sup>100</sup> Payments, however, were continued to Mayor Branca until the ordinance was declared invalid.<sup>101</sup>

The circuit judge, ruling in the city's favor, held that the pension benefit was unlawful and should not be paid.<sup>102</sup> The circuit court found that City of Miramar Ordinance 88-16 "was an increase in benefits as contemplated in article X, section 14, because no such pension benefits existed for elected officials prior to the enactment of Ordinance 88-16 apart from those mandated in section 112.048" of the Florida Statutes.<sup>103</sup> The circuit judge found that the ordinance violated article X, section 14 of the Florida Constitution.<sup>104</sup> The trial judge also found that the city was not estopped to deny the payment of pension benefits. Mayor Branca subsequently appealed.

The Fourth District Court of Appeal, in a 2 to 1 decision written by Judge Polen, concluded that the trial court was correct in denying the continuation of the pension benefit on an estoppel basis. The majority held that the ordinance in question was not a deferred compensation plan exempt from funding requirements. The majority then turned to the constitutional question posed by article X, section 14. The majority stated:

The trial court found, and certainly an argument can be made, that the creation and establishment of a retirement plan for Miramar elected officials under Ordinance 88-16 was an increase in benefits as contemplated in Article X, Section 14, because no such pension benefits existed for elected officials prior to the enactment of Ordinance 88-16 apart from those mandated in section 112.048, Florida Statutes. As such, Ordinance 88-16 would be subject to the requirements of Article X, Section 14. . . .

Notwithstanding, we need not resolve the issue of whether the Ordinance's enactment constituted an "increase" in benefits under Article X, Section 14, Florida Constitution. Rather, we certify the following question:

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99. *Id.*

100. *Id.*

101. *Id.* at 1376.

102. *Branca*, 602 So. 2d at 1375.

103. *Id.* at 1376.

104. *Id.* at 1375.



WHETHER ARTICLE X, SECTION 14, AND THE REQUIREMENTS THEREOF APPLY ONLY TO EXISTING COUNTY OR MUNICIPAL PENSION PLANS, OR WHETHER THE REQUIREMENTS ALSO APPLY TO COUNTY OR MUNICIPAL PENSION PLANS THAT INCREASE OTHER EXISTING GOVERNMENTAL [i.e., STATE] PENSION PLAN BENEFITS.<sup>105</sup>

Judge Farmer dissented, pointing out that when the benefit is not funded on a sound actuarial basis, the remedy is not to obliterate the benefit, but rather to require the funding of it by the governmental unit. Judge Farmer wrote:

The essential rationale for the constitutional and statutory provisions cited by the city, from which I deduce public policy, is not that, if a particular plan is unsound, no one should get paid their retirement. Rather, the policy is to ensure that all retirees actually get paid by making the plans financially trustworthy and capable of meeting reasonably foreseeable obligations. To deny benefits to a retiree where the plan is unsound but the city is able to pay is to shoot the patient rather than to find the cure.<sup>106</sup>

The majority decision, holding that the case did not present either a factual or legal basis for estoppel, disagreed with Judge Farmer's dissent that there was a contractual obligation on the part of the city to pay the promised benefit and that the city was estopped from denying the benefit. The real question, however, is suggested in Judge Farmer's dissent. Essentially, the majority decision does not resolve the question of what is the proper remedy. Specifically, what remedy is appropriate when a beneficiary claims entitlement to a pension benefit that was otherwise lawfully enacted, but was not funded on a sound actuarial basis within the meaning of article X, section 14? Should the court order the governmental unit to fund the benefit on a sound actuarial basis, as required by article X, section 14, or should the court declare the benefit non-existent for the failure to comply with article X, section 14?

The trial court's decision on this point could work mischief. There are a number of possibilities. The government could create a new benefit or increase an existing benefit. The government could provide no funding or some funding, but not on an actuarially sound basis. The government could also initially provide funding on a sound actuarial basis, but discontinue

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105. *Id.* at 1376-77.

106. *Id.* at 1379 (Farmer, J., dissenting).

such funding at a later time. Finally, the government could even provide funding and experts could disagree as to whether such funding was on a sound actuarial basis.

A member or beneficiary of a pension system may bring a civil action to recover benefits due to him, to enforce his rights, or to clarify his rights to future benefits.<sup>107</sup> Under the trial judge's decision in *Branca*, if a member or beneficiary brought suit to complain that an increase in benefits was not adequately funded, the benefit would be abolished.<sup>108</sup> Similarly, if the governmental unit could bring suit that the increased benefit was not adequately funded, the benefit would be abolished. Under any scenario, an attempt to compel the government to fund an increase on a sound actuarial basis would result in the benefit being abolished. How then can the government be compelled to fund an increased benefit on a sound actuarial basis?

The Florida Supreme Court accepted jurisdiction of the case on the certified question,<sup>109</sup> and on January 13, 1994, the court handed down its decision.<sup>110</sup> The supreme court restated the certified question as follows:

WHETHER ARTICLE X, SECTION 14 OF THE FLORIDA CONSTITUTION APPLIES ONLY TO INCREASES IN EXISTING COUNTY OR MUNICIPAL PENSION PLAN BENEFITS.<sup>111</sup>

On the procedural question, the court concluded that under the circumstances, the city could seek a declaratory judgment to challenge the constitutional validity of its own pension ordinance.<sup>112</sup> As to the restated certified question, the court rejected *Branca's* claim that a new benefit is not governed by article X, section 14 of the Florida Constitution, holding:

We reject *Branca's* contention that there can be no increase in benefits unless there is an existing plan. When there is no plan, there are no benefits. However, if a plan is adopted the benefits are increased. It is unreasonable to believe that article X, section 14, requires that an increase in benefits from a preexisting plan be actuarially sound but that a new pension plan carries no similar requirement. We hold that article

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107. FLA. STAT. § 112.66(5) (1978).

108. *Branca*, 602 So. 2d at 1375.

109. *Branca v. City of Miramar*, 618 So. 2d 1367 (Fla. 1993).

110. *Branca v. City of Miramar*, 19 Fla. L. Weekly S28 (Fla. Jan. 13, 1994).

111. *Id.* at S28.

112. *Id.*

X, section 14, applies to new plans as well as existing plans.<sup>113</sup>

Thus, although Florida Statutes part VII, chapter 112 already required that a new plan be funded on a sound actuarial basis, the *Branca* decision raises that requirement from a statutory one to a constitutional one under article X, section 14.

Branca did better on his estoppel argument, however. The court concluded that the pension ordinance was properly enacted.<sup>114</sup> Although recognizing that estoppel against the government has limited applications, the supreme court held:

Branca relied upon the *fact* that ordinance 88-16 had been duly enacted by the city commission. He irrevocably changed his position in reliance upon the ordinance when he retired. The city should not be permitted to unilaterally terminate his pension benefits . . . .

However, the City of Miramar had the statutory authority under section 112.048(3), Florida Statutes (1987), to provide a pension plan for elected officials. The fact that the city created a program which was found to be improperly funded does not preclude relief under the doctrine of equitable estoppel.<sup>115</sup>

The certified question as presented by the Fourth District Court of Appeal and as rephrased by the Florida Supreme Court, is not exactly correct. The question posed was whether article X, section 14 of the Florida Constitution applies only to increases in *existing county or municipal pension plans*. The holding, however, applies article X, section 14 both to increases in *existing plans and new benefits in newly created plans*. The certified question, however, refers to existing county or municipal plans and does not mention the existing state plan. Since the case involved the City

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113. *Id.*

114. *Id.* at S29.

115. *Branca*, 19 Fla. L. Weekly at S29. The court then quoted, with approval, Judge Farmer's dissenting opinion:

The city looks for its authority to cancel this plan in certain state constitutional and statutory provisions relating to the actuarial soundness of public employer retirement plans in Florida. But I do not understand how the fact that this plan may violate these provisions yields the conclusion that the city can just stop paying one of its retirees. I should have thought that the remedy for the constitutional/statutory violation would be to order the city to make the plan actuarially sound out of its own pockets (whether from tax increases or other revenues) but not to order it to stop paying retirement income.

*Id.* (quoting *Branca*, 602 So. 2d at 1378 (Farmer, J., dissenting)).

of Miramar, the reference to municipal pension plans is appropriate. The reference to county pensions plans is dicta.<sup>116</sup> Although, the more interesting question is whether the omission of any reference to "state pension plan benefits" was inadvertent or intentional.

In a case involving the State Retirement System, the court would have another constitutional provision to consider in ordering the Legislature to fund the promised benefit; specifically, the separation of powers requirement.<sup>117</sup> In such a case, the court would have to balance a separation of powers consideration with the specific mandate of article X, section 14 that increases in pension benefits in an existing plan, or new benefits in a newly created plan per the *Branca* decision, be funded on a sound actuarial basis.

Wages and pensions are not the same. There are differences among wages, leave benefits, and pensions, particularly as to funding over a short versus a long period of time.<sup>118</sup>

*State v. Florida Police Benevolent Ass'n*<sup>119</sup> and *Chiles v. United Faculty of Florida*<sup>120</sup> involve the funding of wages and leave benefits that were provided for in collective bargaining agreements. These cases give an indication of how the supreme court might address the problem of requiring the Legislature to fund a promised pension benefit in accordance with article X, section 14.

In *PBA*, the Governor had entered into collective bargaining agreements with several unions which were to be effective between 1987 and 1990.<sup>121</sup> The agreements incorporated by reference certain provisions of the Florida Administrative Code governing annual leave (vacation) and sick leave for public employees. In 1988, the Legislature enacted its General Appropriations Act, which altered the annual leave and sick leave, and which in the aggregate may have had the effect of reducing the bargained-for benefits. The unions contended that the Legislature's actions abridged the right to bargain collectively, as guaranteed by article I, section 6 of the Florida Constitution. Therefore, the revisions to the collective bargaining agreements contained in the appropriations act were invalid. The trial court

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116. It is also inappropriate dicta, since counties do not have pension plans. They are compulsory members of the FRS, the state plan. FLA. STAT. § 121.021(10) (1991); FLA. STAT. § 121.051(1) (1991).

117. FLA. CONST. art. II, § 2.

118. Pensions and wages of public employees are subject to collective bargaining. *City of Tallahassee v. Public Employees Relations Comm.*, 410 So. 2d 487 (Fla. 1981).

119. 613 So. 2d 415 (Fla. 1992) [hereinafter *PBA*].

120. 615 So. 2d 671 (Fla. 1993).

121. *PBA*, 613 So. 2d at 416.

granted summary judgment in favor of the unions, and the district court of appeal affirmed. The Florida Supreme Court discussed the differences between collective bargaining in the private sector and the public sector. The court also discussed separation of powers with respect to the Executive branch's ability to enter into collective bargaining agreements calling for additional appropriations versus the Legislature's exclusive right to appropriate funds. The court did admit, however, that "[t]he facts of the present case are somewhat unique, in that the legislature did not simply under fund or refuse to fund certain benefits, but rather unilaterally changed them. Accordingly, we must determine whether the proviso language at issue here falls under the exclusive domain of the legislature's appropriations power."<sup>122</sup> The court adopted the following test:

We find this test to be a reasonable accommodation of both the right to collectively bargain and the legislature's exclusive control over the public purse. Where the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced. This result would not impede upon the legislature's exclusive power over public funds, because the funds would already be there to enforce the benefit. Where the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of the funds will stand even if contradictory to the negotiated agreement. Any other result would necessarily entail impeding on the right to appropriate, since enforcing the negotiated agreement would necessitate additional funding under this scenario.<sup>123</sup>

The Florida Supreme Court reversed the declaration that the appropriations act was unconstitutional and remanded the cause for further proceedings. The trial court was directed to determine whether the legislative appropriation was sufficient to fund the bargained-for benefit: "If it was, these provisions to the collective bargaining agreement must be enforced. If these provisions were underfunded, the legislative determination shall control."<sup>124</sup>

*Chiles v. United Faculty of Florida*<sup>125</sup> involved wages, specifically pay raises, which the Legislature had authorized. Later, however, the

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122. *Id.* at 420.

123. *Id.* at 421 (footnotes and citation omitted).

124. *Id.*

125. 615 So. 2d 671 (Fla. 1993).

Legislature convened in special session and among other measures, postponed the pay raises involved. During the 1992 regular session, it eliminated them altogether. The unions involved filed suit, and the trial court ruled in their favor, on the grounds that the Legislature's actions violated article I, section 6 and section 10.<sup>126</sup> The State appealed, and the district court of appeal, without deciding the matter, certified the case to the Florida Supreme Court for immediate review as a "throw up."<sup>127</sup> The court stated that the case was different from *PBA*<sup>128</sup> in which no final agreement had been reached by the parties. In *United Faculty*, an agreement had been reached, funded, unilaterally modified by the Legislature, and finally, unilaterally abrogated by the Legislature.

The supreme court described the problem in a nutshell. "Separation of powers does not allow the unilateral and unjustified legislative abrogation of a valid contract."<sup>129</sup> The trial court decision was affirmed. However, on clarification, the decision was limited to the year in which the contracts were funded.<sup>130</sup>

Both of these cases deal with the Legislature's appropriation powers, viewed by its co-equal partner, the Judicial branch, within the framework of the constitutional protection of contracts of a general kind and collective bargaining agreements specifically. These cases do involve the question of the ability of the Florida Supreme Court to order the Legislature to appropriate money to pay for the performance of a contract.

## VI. CONCLUSION

As already suggested by the comment on *Florida Ass'n of Counties v. Department of Administration, Division of Retirement*,<sup>131</sup> the courts may treat the Legislature's funding of increases in public employee pensions differently from that of funding by municipalities.<sup>132</sup> The courts' ability to order the Legislature to fund a contract may be more limited than the courts' ability to order a city to fund a promised benefit. When the case involves a city, separation of powers considerations simply do not exist. If

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126. *Id.*

127. *Id.* at 672; FLA. R. APP. P. 9.030(a)(2)(B)(i).

128. 613 So. 2d at 415.

129. *United Faculty of Fla.*, 615 So. 2d at 673.

130. *Id.* at 677-78.

131. 580 So. 2d 641 (Fla. 1st Dist. Ct. App. 1991).

132. *See supra* text accompanying notes 85-86.

the court was willing in *United Faculty* to require the Legislature to fund a promised benefit because it had already been funded and then unfunded, and was willing in *PBA* to remand the cause to determine whether there was sufficient funding so as to require enforcement of the contract, then it should not be the least reluctant to formulate a remedy by which the judicial branch is capable of directing the Legislative branch to fund a promised benefit. Thus, Judge Farmer's question recurs: Should we shoot the patient or find the cure? What is the remedy for the failure of the legislative body (whether state or local government) to fund on a sound actuarial basis, a promised pension benefit to an employee who has already retired?<sup>133</sup>

Under *Florida Sheriffs Ass'n v. Department of Administration, Division of Retirement*,<sup>134</sup> such a retiree has a vested property right. This property right cannot be taken away from him because of the failure of the government to provide for funding. The promised benefit must be funded by the government in compliance with article X, section 14 of the Florida Constitution.<sup>135</sup> In *Branca*, however, the supreme court was not confronted with any consideration of separation of powers that might exist when the government involved is the State of Florida itself. Thus, a case against the state rather than a city would involve the balancing of several constitutional considerations: the employee's contract and property rights; the specific requirement that the government appropriate money as expressed in article X, section 13; and the ability of the judicial branch to appropriate money.

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133. *Branca*, 602 So. 2d at 1377-79.

134. 408 So. 2d 1033, 1037 (Fla. 1981).

135. *Branca*, 19 Fla. L. Weekly at S28.





## PART VI

### AMENDING THE CONSTITUTION

*Unlike the Federal Constitution, Florida's Constitution is constantly being amended. As a result, in the final part of our Symposium we look at some past as well as some possible future changes.*

*Attorneys Steven J. Uhlfelder and Robert A. McNeely begin by recalling the activities of the 1978 Constitution Revision Commission. Although often described as a failure, the authors explain why this historical perception of the Commission's work is inaccurate. Next, Florida Secretary of State Jim Smith provides a primer on initiative petitions, the method of amendment that places power directly in the hands of the people. Finally, Professor Thomas C. Marks, Jr. and attorney Alfred A. Colby conclude by setting out six specific changes that they would like to see made in the Constitution.*

# The 1978 Constitution Revision Commission:

## Florida's Blueprint for Change

**Steven J. Uhlfelder\***  
**Robert A. McNeely\*\***

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### I. INTRODUCTION

TALLAHASSEE—The chilly gray sky that hung over this capital city Wednesday fit Steven Uhlfelder's mood.

Winter was coming, and the 32-year-old special counsel to retiring Gov. Reubin Askew felt like leaving . . . . [A]fter the voters' crushing rejection of the constitution revision package that had occupied him for the last 15 months, Uhlfelder didn't know Wednesday whether he even wanted to continue in Florida government.

Returning to his Capitol office after lunch, he ran into 31-year-old Tampa Rep. George Sheldon, one of the few state lawmakers who had worked for the proposed revisions.

Sheldon shrugged his shoulders.

Uhlfelder shrugged in reply.

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\* Partner, Holland & Knight, Tallahassee, Fla.; B.S., 1968, University of Florida; J.D., 1971, University of Florida. Mr. Uhlfelder was the executive director of the first Florida Constitution Revision Commission in 1977 and 1978.

\*\* Associate, Steel Hector & Davis, Miami, Fla.; B.S., 1981, University of Kansas; J.D., 1993, Florida State University.

"What do we do now?" Sheldon asked.

"Try again in 20 years," Uhlfelder said . . . .<sup>1</sup>

Change often comes slowly in a democracy. In 1978, Florida voters rejected all of the recommendations of the first Florida Constitution Revision Commission ("CRC").<sup>2</sup> Since that time, however, many of the major recommendations of the CRC have been adopted by voters or enacted by the Florida Legislature.<sup>3</sup> Thus, in many ways, the CRC was simply ahead of its time as it set the stage for dramatic changes in Florida.

The willingness of the electorate and its elected representatives to subscribe ultimately to so many of the CRC's recommendations is not surprising. A tremendous amount of study and debate preceded each of the eight proposed amendments.<sup>4</sup> For two months the CRC traveled the state and listened to more than 600 witnesses discuss more than 800 issues during ten public hearings.<sup>5</sup> The CRC held additional public hearings after the proposed draft amendments were prepared.<sup>6</sup> In January of 1978, after twenty-five meetings, the CRC considered 257 proposed changes to the constitution and adopted eighty-seven of them.<sup>7</sup> Subsequently, the CRC held additional hearings throughout the state in which it solicited and received testimony from another 200 witnesses.<sup>8</sup> The result was a document consisting of numerous changes grouped into eight separate constitutional amendments.<sup>9</sup>

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1. Don Pride, *The Unmaking of Constitution Revision*, ST. PETERSBURG TIMES, Nov. 12, 1978, at A1.

2. The 1968 revision to the Florida Constitution created the unique internal mechanism for constitutional review, the Constitution Revision Commission. See FLA. CONST. art. XI, § 2; see also TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 146-47 (1991). The CRC, with members appointed by the Governor, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the supreme court, and the Attorney General, first convened in 1977 and proposed constitutional changes for the 1978 general election ballot. A new commission will convene in 1997 to consider changes for the 1998 general election.

3. See *infra* notes 16-148 and accompanying text.

4. The CRC developed eight amendments containing 87 proposals which were placed on the 1978 general election ballot. See *Florida CRC Proposed Revision of the Florida Constitution* (1978) [hereinafter *Proposed Revision*].

5. Steven J. Uhlfelder, *The Machinery of Revision*, 6 FLA. ST. U. L. REV. 575, 579 (1978).

6. *Id.* at 583.

7. *Id.*

8. *Id.*

9. See *Proposed Revision*, *supra* note 4.

In those eight proposed amendments to the constitution, the CRC recommended forty-seven substantive and forty procedural changes.<sup>10</sup> More than forty percent of the substantive recommendations are now law in Florida, either by voter approval at subsequent general elections or by legislative enactment.<sup>11</sup> Twenty percent of the procedural recommendations have similarly been adopted or enacted.<sup>12</sup>

This article reviews the CRC proposals that voters ultimately adopted, or that the Legislature substantially enacted. In so doing, this article demonstrates that the 1978 CRC's success should not be measured by the short-term gloomy analysis of that morning after the 1978 ballot, because proponents of the CRC's work did not have to wait 20 years to see the fruits of their labor. Instead, the proper measure is the CRC's long-term continuing positive effect on public policy and the workings of government in Florida.

## II. SUBSTANTIVE PROPOSALS

### A. *Proposals Affecting Individual Rights*

The late Pat Dore,<sup>13</sup> a renowned scholar in Florida constitutional law, wrote in 1978 that "[t]he commission was intensely concerned about the protection of individual rights."<sup>14</sup> She observed that the Commission convened in the afterglow of the nation's bicentennial celebration, and "pride and good feelings . . . were still running high[.]" noting that this reality contributed to the commission's "commitment to the preservation of human liberty and individual freedom."<sup>15</sup> Several of the CRC's proposals regarding individual rights were ultimately adopted, and are now law in Florida.

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10. For the purposes of this article, a substantive recommendation fundamentally affects the exercise of individual rights and liberties, the process of democracy, or the raising and spending of revenues. A procedural recommendation affects the methods by which state or local government operates.

11. See *infra* notes 16-128 and accompanying text.

12. See *infra* notes 129-148 and accompanying text.

13. Professor Dore taught a generation of students at The Florida State University College of Law from 1970 until her death in 1992. In 1978, she served on the staff of the CRC.

14. Patricia A. Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U. L. REV. 610, 611 (1978).

15. *Id.*

*Privacy.* The CRC recommended the adoption of a privacy amendment to the Florida Constitution which read: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."<sup>16</sup> Talbot "Sandy" D'Alemberte<sup>17</sup> described this provision as an important protection "against governmental intrusion into purely private matters."<sup>18</sup> He noted the "tendencies of other industrial societies toward the superstate and abuses by government officials in this country" as reasons for the "constant vigilance" the amendment would provide.<sup>19</sup> Among the arguments raised by opponents of this provision was one asserting that government officials would "use it as an excuse for failing to produce public records . . . ."<sup>20</sup> The Legislature addressed this concern in 1980, adding to the CRC's language the following: "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."<sup>21</sup> Voters adopted this amendment, including the CRC's text word-for-word in 1980.<sup>22</sup>

*Pretrial Release.* The CRC proposed an amendment to provide a presumption in favor of nonmonetary bail,<sup>23</sup> in order to change the existing constitutional requirement that a person charged with a crime be "release[d] on reasonable bail *with sufficient surety*."<sup>24</sup> Then-Governor Reubin Askew once characterized the monetary bail system as one that "discriminates against the poor, and burdens the taxpayers with the cost of detaining those awaiting trial who need not be in jail."<sup>25</sup> Chairman D'Alemberte noted

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16. *Proposed Revision*, *supra* note 4, at 1 (proposed FLA. CONST. art. I, § 23).

17. Mr. D'Alemberte served as chairman of the CRC. He is a past president of the American Bar Association, former partner of Steel Hector & Davis, and is currently the president of Florida State University.

18. Talbot "Sandy" D'Alemberte, *Revision I: The Pros and Cons*, FLA. TIMES UNION, Oct. 28, 1978, at B7.

19. *Id.*

20. Dan Paul, *Con*, THE LAKE LAND LEDGER, Oct. 22, 1978, at 2.

21. Fla. CS for HJR 387, at 1788 (1980) (proposed FLA. CONST. art. I, § 23).

22. FLA. DEP'T OF STATE, DIV. OF ELECTIONS, TABULATION OF OFFICIAL VOTES, FLA. GEN. ELECTION 34 (1980) [hereinafter 1980 GEN. ELECTION]. For a comprehensive analysis of the 1978 CRC proposal, see Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671 (1978).

23. *Proposed Revision*, *supra* note 4, at 1 (proposed FLA. CONST. art. I, § 14).

24. FLA. CONST. art. I, § 14 (amended 1982) (emphasis added).

25. As quoted in Bennet H. Brummer and Bruce S. Rogow, *An End to Ransom: the Case for Amending the Bail Provision of the Florida Constitution*, 6 FLA. ST. U. L. REV. 775, 775 n.1 (1978).

that the bail provision was being "updated to reflect modern practice."<sup>26</sup> Opponents cited recidivist criminals and condemned this "absolute right to bail . . . ."<sup>27</sup> Despite its rejection in 1978, by 1982 a combination of legislation and voter action made this recommendation part of Florida law. Voters amended the constitution to allow "pretrial release on reasonable conditions."<sup>28</sup> The Legislature enacted section 907.041 of the Florida Statutes<sup>29</sup> which declared its intent "to create a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release."<sup>30</sup>

*Grand Jury Counsel.* The CRC also recommended guaranteeing grand jury witnesses the right to be accompanied by, and to receive the advice of, counsel during grand jury proceedings.<sup>31</sup> While supporters argued the guarantee would bring fairness to grand jury proceedings, opponents warned it would "destroy the secrecy and investigatory function of the grand jury . . . ."<sup>32</sup> In 1992, the Legislature passed a law allowing one attorney to be present to provide a witness advice and counsel.<sup>33</sup>

*Accessible Polls.* Finally, in an effort to make government more accessible to the public, the CRC suggested an amendment to article VI, section 1, to require that elections be held in "places accessible to the public."<sup>34</sup> By the time this provision was before voters, the Legislature had enacted it statutorily.<sup>35</sup>

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26. Talbot "Sandy" D'Alemberte, *Pro*, THE LAKELAND LEDGER, Oct. 22, 1978, at 2.

27. Paul, *supra* note 20.

28. FLA. DEPT. OF ST., DIV. OF ELECTIONS, TABULATION OF OFFICIAL VOTES, FLA. GEN. ELECTION 27 (1982) [hereinafter 1982 GEN. ELECTION] (adopting Fla. HJR 43-H, at 2201 (1982), amending FLA. CONST. art. I, § 14).

29. Ch. 82-398, 1982 Fla. Laws 2150 (codified as FLA. STAT. § 907.041 (1982)).

30. *Id.*

31. *Proposed Revision*, *supra* note 4, at 1 (proposed FLA. CONST. art. I, § 15).

32. Dore, *supra* note 14, at 645.

33. Ch. 92-154, 1992 Fla. Laws 1633 (codified at FLA. STAT. § 905.17 (Supp. 1992)). The Legislature stressed that it was not creating a *right* to grand jury counsel, as the CRC proposed. Section 905.17 says, in part, "[t]his provision is permissive only and does not create a right to counsel for the grand jury witness." FLA. STAT. § 905.17 (Supp. 1992).

34. *Proposed Revision*, *supra* note 4, at 7 (proposed FLA. CONST. art. VI, § 1). The CRC considered other alternatives besides the quoted language that was eventually proposed, all in an effort to make polling places accessible to voters. See Elaine S. Williams, *A Summary and Background Analysis of the Proposed 1978 Constitutional Revisions*, 6 FLA. ST. U. L. REV. 1115, 1148-50 (1978).

35. Ch. 78-188, 1978 Fla. Laws 594 (codified at FLA. STAT. § 101.71 (1991)).

*One That Got Away.* Far and away, the most controversial individual rights proposition was the one which had the least verbiage. The CRC proposed adding the word "sex" to the basic declaration of rights in article I, section 2, prohibiting the deprivation of any right because of sex.<sup>36</sup> Opposition to this proposal ranged from the reasoned to the emotional. For example, commission member Sen. Dempsey Barron, D-Panama City, argued against the proposal by saying it was unnecessary and open to uncertain interpretations. Senator Barron said he believed it was unnecessary because of the state constitutional declaration, "All natural persons are equal before the law and have inalienable rights . . .;" and open to uncertain interpretations, because no one knew what a court would do with such a broad term in the future.<sup>37</sup> Others argued that the proposal would allow homosexuals to marry and adopt children, invalidate state laws requiring husbands to support wives, and invalidate state laws prohibiting rape and prostitution.<sup>38</sup> Supporters argued that the amendment was necessary to ensure that women were not discriminated against by virtue of their gender.<sup>39</sup>

This recommendation of the 1978 CRC has never been adopted. Legislative protections remain in many areas, such as wage and lending discrimination,<sup>40</sup> but an express constitutional protection of the type envisioned by the CRC is still absent from the Florida Constitution.<sup>41</sup>

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36. *Proposed Revision*, *supra* note 4, at 1 (proposed FLA. CONST. art. I, § 2).

37. Sen. Dempsey Barron, *Against Revision No. 2*, FLA. TIMES UNION, Oct. 30, 1978, at A7 (quoting FLA. CONST. art. I, § 1).

38. See generally Advertisement, *You should vote NO to Revision No.2*, TALLAHASSEE DEMOCRAT, Nov. 6, 1978.

39. See, e.g., Dr. Freddie L. Groomes, *For Revision No. 2*, FLA. TIMES UNION, Oct. 30, 1978, at A7 (arguing that statutory prohibitions on gender discrimination were "subject to legislative change every year and varying judicial interpretations.").

40. See FLA. STAT. §§ 448.07, 725.07 (1991).

41. As further evidence that the CRC was ahead of its time, as this article was being written, the debate over the meaning and merits of sex-based discrimination continued, with two groups seeking signatures to place proposed constitutional amendments on the 1994 general election ballot. One group would constitutionally ban gay-rights laws; the other would constitutionally prohibit many forms of discrimination toward gays. See Steve Bousquet, *Gay rights activists launch drive to alter Constitution*, MIAMI HERALD, Oct. 1, 1993, at 5B. In the furor over gay rights, efforts to provide constitutional protection against gender-based discrimination—the general intent of the CRC—seems to have been lost. For an analysis of CRC deliberations giving insight into this general intent, see Ruth L. Gokel, *One Small Word: Sexual Equality Through the State Constitution*, 6 FLA. ST. U. L. REV. 948, 951-56 (1978).

## B. *Proposals Affecting the Process of Government*

In addition to impacting individual rights and liberties, the CRC also set the stage for important changes in the process of government. Chief among these proposals for change were ones which were “inextricably interwoven” to the privacy amendment.<sup>42</sup> The proposals involved opening government records and operations to public inspection and view, giving constitutional authority to Florida’s statutory public records and government-in-the-sunshine laws.<sup>43</sup>

Two important goals formed the foundation of the CRC’s recommendations in this area. The first was to respond

to the concerns of those who worried that Florida’s nationally recognized devotion to ‘government in the sunshine’ was slowly eroding, as well as to those who maintained that the public’s right to know was a principle of such fundamental importance in a democracy that it ought to be included in the declaration of rights.<sup>44</sup>

The second goal underlying these recommendations was “a statement of standards against which exceptions to the principle of openness [was] to be tested.”<sup>45</sup> The key was to establish criteria to guide lawmakers and judges in deciding whether to allow an exception to the broad statement of principle of openness in government.<sup>46</sup> Thus, the CRC proposed constitutionally requiring open government, except when it was “essential to accomplish overriding governmental purposes or to protect privacy interests.”<sup>47</sup> The CRC proposal allowed the Legislature to make that determination by passing a general law.

*Public Records.* The CRC proposed that no one should be denied the right to examine public records.<sup>48</sup> While some saw this proposal as having a “substantial effect” on government,<sup>49</sup> others said the proposal “invite[d]

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42. Dore, *supra* note 14, at 657 (“Approval of the right to be let alone meant that open government proposals also had to be approved in order to maintain a constitutional balance between the two.”).

43. See generally FLA. STAT. ch. 119 (Supp. 1992).

44. Dore, *supra* note 14, at 664-65.

45. *Id.* at 665.

46. *Id.*

47. *Proposed Revision, supra* note 4, at 1 (proposed FLA. CONST. art. I, § 24).

48. *Id.*

49. Karen S. Minerva, *Revision 1: The Many Basic Document Changes*, THE LAKELAND LEDGER, Oct. 22, 1978, at 1.



the Legislature to make exceptions” to the existing open records law.<sup>50</sup> Fourteen years after the proposal by the CRC, the Legislature placed an open records provision on the ballot,<sup>51</sup> and voters adopted it.<sup>52</sup> The 1992 language closely paralleled that of the CRC, especially in defining a standard by which the Legislature could exempt records from the new constitutional requirement of openness. The adopted language required a specific legislative finding of a “public necessity justifying the exemption . . . no broader than necessary to accomplish the stated purpose of the law.”<sup>53</sup> Although this language has not yet been construed by an appellate court, it seems to parallel Professor Pat Dore’s comments on the 1978 standard: “[I]f less drastic means are available to the government through which it can achieve that interest of overriding importance, the means selected are not essential and the legislation fails to satisfy the standard.”<sup>54</sup>

*Public Meetings.* Similarly, voters in 1992 adopted a constitutional amendment making meetings of public bodies open to the public when official acts will be taken, or at which public business will be discussed.<sup>55</sup> The CRC proposed substantially similar language in 1978.<sup>56</sup>

*Open Judiciary.* In the same spirit, the 1978 CRC suggested that all judicial hearings and records be made open to the public, except for grand and petit jury hearings and proceedings and records closed “to accomplish overriding governmental purposes or to protect privacy interests.”<sup>57</sup> Furthermore, the CRC expressly applied its openness requirement to judicial nominating commissions.<sup>58</sup> Much of this CRC recommendation is now part of the constitution. Judicial records are expressly open to public inspection by the 1992 adoption of article I, section 24.<sup>59</sup> All proceedings, except for deliberations of judicial nominating commissions, are expressly

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50. Paul, *supra* note 20.

51. Fla. CS for HJR’s 1727, 863, and 2035 (1992) (proposed FLA. CONST. art. I, § 24).

52. FLA. DEP’T. OF STATE, DIV. OF ELECTIONS, TABULATION OF OFFICIAL VOTES, FLA. GEN. ELECTION 117 (1992) (hereinafter 1992 GEN. ELECTION).

53. FLA. CONST. art. I, § 24.

54. Dore, *supra* note 14, at 666.

55. 1992 GEN. ELECTION, *supra* note 52, at 117.

56. *Proposed Revision*, *supra* note 4, at 1 (proposed FLA. CONST. art. I, § 25).

57. *Id.* (proposed FLA. CONST. art. V, § 1).

58. *Id.* at 4 (proposed FLA. CONST. art. V, § 11(c)). For a discussion of the open judiciary debate, see Dore, *supra* note 14, at 662-64.

59. See 1992 FLA. GEN. ELECTION, *supra* note 52, at 117.

open to the public by amendment in 1984.<sup>60</sup> Only judicial hearings have escaped the constitutional requirement of openness.

Thus, it is clear that the work of the 1978 CRC, although rejected that year, sent public policy ripples throughout Florida's future and marked the beginning of dramatic and important changes in the way government allowed its citizens to scrutinize government operations.

The CRC's work also influenced changes in the election process and the structure of government.

*Single-Member Districts.* Commission member Bill James<sup>61</sup> described the CRC's proposal to create single-member legislative districts<sup>62</sup> as "[t]he single most important change to be recommended by the Constitution Revision Commission for Florida voter approval . . . ."<sup>63</sup> At the time, legislators were elected from multi-member districts, a circumstance that James said made "it very difficult for citizens to identify their legislators or to monitor their service . . . [and tended] to deny minorities, ethnic groups and women, the opportunity to have a voice in their government."<sup>64</sup> Opponents of the change worried that urban legislators would "produce representatives and senators with such a parochial point of view that they [would] lack perspective on statewide or even citywide or countywide problems."<sup>65</sup> Within four years of the CRC recommendation, the Legislature made the change to single-member districts through a joint resolution.<sup>66</sup>

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60. FLA. DEP'T. OF STATE, DIV. OF ELECTIONS, TABULATION OF OFFICIAL VOTES, FLA. GEN. ELECTION 39 (1984) (adopting Fla. HJR 1160 1984)) (proposed FLA. CONST. art. V, § 11(d)) [hereinafter 1984 GEN. ELECTION].

61. In 1978, Mr. James was the Republican leader of the Florida House of Representatives, representing Delray Beach.

62. *Proposed Revision*, *supra* note 4, at 13 (proposed FLA. CONST. art. III, § 16).

63. Rep. Bill James, R-Delray Beach, *Benefits cited for single districts*, FLA. TIMES-UNION, Oct. 31, 1978, at 13.

64. *Id.*

65. Manning J. Dauer, *It would promote narrow views*, FLA. TIMES-UNION, Oct. 31, 1978, at B3.

66. Fla. SJR 1-E, at 1851 (1982) (codified at FLA. STAT. §§ 10.102, 10.103 (1991)). Unfortunately, neither the voters in 1978 nor the Legislature since then has adopted a CRC recommendation to remove the legislative reapportionment process from the Legislature, placing it in the hands of an independent reapportionment commission. *Proposed Revision*, *supra* note 4, at 13 (proposed FLA. CONST. art. III, § 16). The CRC's plan included reapportionment standards and subjected the reapportionment commission's report to judicial review. *Id.* Given the fiasco that results when legislators try to reapportion their own

*Term Limits.* Apparently responding to what it concluded were inequities between restrictions on the Governor and the various cabinet officers,<sup>67</sup> the CRC recommended that cabinet officers be limited to two consecutive terms.<sup>68</sup> The CRC adopted this proposal “with little debate”<sup>69</sup> and amid a much more ambitious program for overhauling the executive branch of government—abolishing the Cabinet outright.<sup>70</sup> Even some opponents of abolishing the cabinet system favored limiting terms of cabinet members.<sup>71</sup> Nonetheless, voters rejected these term limitations, apparently because it was part of the large revision package (Revision #1).<sup>72</sup> In 1992, however, voters adopted an initiative petition proposal and limited terms for most state elected officials, including all members of the Cabinet.<sup>73</sup>

*Department of Health.* Citing “[d]issatisfaction with the alleged low priority given public health by [the Department of Health and Rehabilitative Services],”<sup>74</sup> the CRC recommended creating one agency with responsi-

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districts after each decennial census, part of the 1992 reapportionment map is so hotly contested by Democrats and Republicans that it is awaiting a decision by the United States Supreme Court, see Tim Nickens, *Dade redistricting battle unfolds before high court*, MIAMI HERALD, Oct. 5, 1993, at 1A. This is an idea that remains long overdue for adoption.

67. See, e.g., *Summary and Analysis*, *supra* note 34, at 1118 and n.7 (observing that while governors were limited to two terms, cabinet officers had no such limits, one having served for 37 years).

68. *Proposed Revision*, *supra* note 4, at 2 (proposed FLA. CONST. art. II, § 5).

69. *Williams*, *supra* note 34, at 1119.

70. *Proposed Revision*, *supra* note 4, at 14 (proposed FLA. CONST. art. IV, § 4). For arguments for and against this proposal to abolish the Cabinet, see Jon C. Moyle, *Why We Should Abolish Florida's Elected Cabinet*, 6 FLA. ST. U. L. REV. 591 (1978) and Malcolm B. Johnson, *Why We Should Keep Florida's Elected Cabinet*, 6 FLA. ST. U. L. REV. 603 (1978).

71. Johnson, *supra* note 70, at 607:

There is validity to an objection that Cabinet officers now can build separate, autocratic empires by unlimited tenure while serving under Governors who are allowed to succeed themselves only once. They can thereby become too powerful and develop proprietary attitudes toward their public offices. However, the Constitution Revision Commission admirably meets this objection with a clause . . . which would limit future Cabinet officers to two successive four-year terms if they are retained.

*Id.*

72. FLA. DEP'T. OF STATE, DIV. OF ELECTIONS, TABULATION OF OFFICIAL VOTES, FLA. GEN. ELECTION 26 (1978) [hereinafter 1978 GEN. ELECTION].

73. 1992 GEN. ELECTION, *supra* note 52, at 123 (adopting Florida Initiative Petition filed with Secretary of State July 23, 1992, amending FLA. CONST. art. VI, § 4).

74. *Williams*, *supra* note 34, at 1138.

bility for all state health care functions.<sup>75</sup> In 1992, the Legislature substantially enacted this recommendation.<sup>76</sup>

*Governor's Authority.* While Florida's antiquated and cumbersome cabinet system remains,<sup>77</sup> making Florida's chief executive the weakest in the country, some movement toward streamlining government operations and placing more responsibility with the Governor has occurred. For example, the Department of Natural Resources and the Department of Environmental Regulation have been merged to create one single Department of Environmental Protection with a secretary serving at the pleasure of the Governor,<sup>78</sup> and the Department of General Services has been reorganized into the Department of Management Services, supervised by the Governor alone.<sup>79</sup>

### C. *Proposals Affecting Financing and Taxation*

The CRC made numerous recommendations affecting change in government finance and taxation.<sup>80</sup> These suggestions represented "an attempt to provide a more consistent constitutional structure for the fundamental law governing local revenue bond issues, and to prevent certain abuses in Florida which have unfortunately plagued local and state governments elsewhere in the United States."<sup>81</sup> Voters have adopted several of the recommendations since 1978, and the Legislature has enacted others.

*Bond Restrictions.* The CRC recommended restricting the purposes for which state revenue bonds and bonds pledging the state's full faith and

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75. *Proposed Revision*, *supra* note 4, at 4 (proposed FLA. CONST. art. IV, § 11).

76. See ch. 92-33, 1992 Fla. Laws 238, 241 (codified at FLA. STAT. § 20.42 (Supp. 1992)).

77. For a discussion of the CRC's recommendation to abolish the cabinet system entirely, see *supra* notes 68-74 and accompanying text.

78. Ch. 93-213, § 3, 1993 Fla. Laws 2129, 2133. The Department of Natural Resources was formerly run by the Governor and the Cabinet. FLA. STAT. § 20.25(1) (1991).

79. FLA. STAT. § 20.22(1) (Supp. 1992). The Department of General Services was formerly run by the Governor and the Cabinet. FLA. STAT. § 20.22(1) (1991).

80. See *generally Proposed Revision*, *supra* note 4, at 17-18 (proposed FLA. CONST. art. VII).

81. Arnold L. Greenfield, *Flexibility and Fiscal Conservatism: Provisions of the 1978 Constitutional Revision Relating to Bond Financing*, 6 FLA. ST. U. L. REV. 821, 823 (1978).

credit could be issued.<sup>82</sup> The restrictions would have limited the use of such bonds to fixed capital outlay projects and purposes incidental thereto.<sup>83</sup> Thus, such bonds could not have been used to finance operational costs,<sup>84</sup> the economic theory being that it is fiscally unwise to go into long-term debt to finance recurring state operations.<sup>85</sup> Although rejecting this proposal in 1978,<sup>86</sup> voters adopted it six years later.<sup>87</sup>

*Water Facility Bonds.* Writing that bond buyers were “seriously concerned about the ability and commitment of the state to provide a solution to its potentially dangerous water resource situation[,]” a CRC committee recommended extending pledges of the state’s full faith and credit to water facilities.<sup>88</sup> The CRC adopted the idea<sup>89</sup> in part to allow “local governments to finance needed facilities at the lowest possible interest rates because of the additional security of the state’s credit.”<sup>90</sup> In 1980, voters adopted the CRC’s language.<sup>91</sup>

*Housing Bonds.* The CRC recommended the creation of a new bond authorization for housing and the establishment of a state housing agency.<sup>92</sup> The proposal was “best understood as an economic stabilizer and as a potential source of housing capital for consumers who might be just beyond

82. *Proposed Revision*, *supra* note 4, at 18 (proposed FLA. CONST. art. VII, § 11).

83. *Id.*

84. *Id.*

85. Or, put another way:

This revision is intended to make clear that long-term bonded indebtedness should be incurred only to finance long-term improvements with a useful life that will not be substantially less than the amortization period of the debt. . . . [It] is consistent with the philosophy that long-term debt should not be incurred to fund recurring expenditures which in turn cause pyramiding principal and interest obligations. Experiences in other states have indicated that there is just a short step to disaster when current expenses are included in an entity’s capital budget.

*Greenfield*, *supra* note 81, at 824 (citing the “near bankruptcy of New York City” for support).

86. 1978 GEN. ELECTION, *supra* note 72, at 27.

87. 1984 GEN. ELECTION, *supra* note 60, at 41 (adopting Fla. CS for CS for SJR 612, at 2223 (1984), amending FLA. CONST. art. VII, § 11).

88. *Greenfield*, *supra* note 81, at 828 n.18.

89. *Proposed Revision*, *supra* note 4, at 17 (proposed FLA. CONST. art. VII, § 14).

90. *Greenfield*, *supra* note 81, at 828.

91. 1980 GEN. ELECTIONS, *supra* note 22, at 34 (adopting Fla. HJR 1471, at 1790 (1980), amending FLA. CONST. art. VII, § 14).

92. *Proposed Revision*, *supra* note 4, at 17 (proposed FLA. CONST. art. VII, § 16).

the limits of the supply of mortgage money at reasonable interest rates without this additional source of funding.”<sup>93</sup> Even an opponent of other finance and taxation changes supported this provision.<sup>94</sup> Nonetheless, voters rejected this proposal,<sup>95</sup> as they did to a similar proposal in 1976.<sup>96</sup> In 1980, however, a substantially similar proposal was adopted.<sup>97</sup>

*Homestead Exemption/Natural Person.* In 1978, only property owners who were “the head of a family” could claim a constitutional homestead protection from forced sale.<sup>98</sup> The CRC recommended expanding the exemption provision to include all “natural persons” who owned property.<sup>99</sup> One commissioner urged that the change was required by “the facts of life” which included “an enormous number of divorces,” “full recognition that the sociological foundations of society have changed,” and that “many single women . . . are heads of households . . . .”<sup>100</sup> Voters adopted this change in 1984.<sup>101</sup>

*Solar Energy Exemption.* The CRC also recommended allowing the Legislature to exempt from property taxes for ten years any increases in assessed valuation which were due to the installation of solar energy systems.<sup>102</sup> Coming less than five years after the OPEC oil crisis, the proposal was seen as “an incentive for the use of solar energy.”<sup>103</sup> One proponent of the change spelled out its benefits clearly:

Since 88 percent of Florida’s energy needs are supplied by oil and natural gas, Florida is extremely vulnerable to energy shortages and

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93. *Greenfield*, *supra* note 81, at 832-33.

94. Jon Moyle, *Against*, FLA. TIMES-UNION, Nov. 4, 1978, at B7 (“A housing finance agency is certainly needed.”).

95. 1978 GEN. ELECTION, *supra* note 72, at 27.

96. *Greenfield*, *supra* note 81, at 830 n.23.

97. 1980 GEN. ELECTION, *supra* note 22, at 34 (adopting Fla. SJR 6-E, at 1776 (1980), creating FLA. CONST. art. VII, § 16).

98. *See* FLA. CONST. art. X, § 4(a) (1977).

99. *Proposed Revision*, *supra* note 4, at 8 (proposed FLA. CONST. art. X, § 3(a)).

100. Dennis J. Wall, *Homestead and the Process of History: The Proposed Changes in Article X, Section 4*, 6 FLA. ST. U. L. REV. 877, 905 (1978) (quoting Commissioner Yvonne Burkholz).

101. 1984 GEN. ELECTION, *supra* note 60, at 38 (adopting Fla. HJR 40, at 2369 (1983), amending FLA. CONST. art. X, § 4(a)).

102. *Proposed Revision*, *supra* note 4, at 17 (proposed FLA. CONST. art. VII, § 4(b)(3)).

103. *Williams*, *supra* note 34, at 1156 (citing Transcript of Florida CRC proceedings 295 (Jan. 24, 1978) (remarks of Commissioner Ware)).

increasing costs. These energy sources are also potential polluters of air and water, and Florida should encourage the development of solar energy industries and technology as soon as possible.<sup>104</sup>

Following the CRC's lead, the 1980 Legislature enacted a partial tax exemption for renewable energy sources.<sup>105</sup>

*Historic Property Valuation.* The CRC also recommended authorizing the Legislature to give preferential tax treatment to historic property in order to encourage its preservation.<sup>106</sup> While this provision has not been expressly adopted, in 1992 voters approved a constitutional amendment that allows counties and municipalities to exempt historic properties from ad valorem taxation and authorizes the Legislature to determine the duration of such exemptions.<sup>107</sup>

*"Widower" Exemption.* Also in 1978, the Florida Constitution provided for a \$500 personal property tax exemption for widows of persons who were blind or disabled.<sup>108</sup> Citing "the interests of fairness and consistency,"<sup>109</sup> the CRC recommended including widowers.<sup>110</sup> Voters finally made this change in 1988.<sup>111</sup>

*Inventory Classification.* Furthermore, the CRC suggested granting the Legislature the power to classify inventories for tax purposes and allowing the Legislature to exempt inventories from taxation completely, if it so chose.<sup>112</sup> The main purpose of this provision was to provide constitutional authority to the legislative practice of classifying different inventories differently for tax purposes.<sup>113</sup> Although the provision was rejected in

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104. Sen. Ken Plante, R-Winter Park, *For*, FLA. TIMES-UNION, Nov. 4, 1978, at B7.

105. Ch. 80-163, 1980 Fla. Laws 525, 529 (codified at FLA. STAT. § 196.175 (1991)).

106. *Proposed Revision*, *supra* note 4, at 17 (proposed FLA. CONST. art. VII, § 3(e)).

107. 1992 GEN. ELECTION, *supra* note 52, at 118 (adopting Fla. SJR 152, at 3310 (1992), creating FLA. CONST. art. VII, § 3(e)).

108. FLA. CONST. art. VII, § 3(b) (amended 1988).

109. *Williams*, *supra* note 34, at 1153.

110. *Proposed Revision*, *supra* note 4, at 17 (proposed FLA. CONST. art. VII, § 3(b)).

111. FLA. DEP'T. OF STATE, DIV. OF ELECTIONS, TABULATION OF OFFICIAL VOTES, FLA. GEN. ELECTION 54 (1988) (adopting Fla. CS for SJR 318, 356, at 2430, amending FLA. CONST. art. VII, § 3(b)) [hereinafter 1988 GEN. ELECTION].

112. *Proposed Revision*, *supra* note 4, at 17 (proposed FLA. CONST. art. VII, § 4(b)(1)).

113. *Williams*, *supra* note 34, at 1154 ("The new language would legitimize differential assessment levels for inventory.").

1978,<sup>114</sup> voters adopted identical language two years later.<sup>115</sup>

"*Second Gas Tax*". The CRC also made two recommendations related to the "second gas tax"<sup>116</sup> that were ultimately adopted. The CRC suggested allowing the tax to be used for the maintenance of roads, instead of only for acquisition and construction.<sup>117</sup> The CRC also recommended allowing the pledging of funds from the tax and "other legally available pledged revenues" to retire road bonds.<sup>118</sup> This road bond provision was considered "very significant" to help cover the debt service for road projects.<sup>119</sup> Voters amended the constitution in 1980 to adopt both of these changes.<sup>120</sup>

Thus, although it was unsuccessful in persuading voters to adopt numerous taxation and finance reforms in 1978, much of the CRC's work in the area ultimately became law.

*Another One That Got Away.* Hoping to reform a system "fraught with confusion and inequity,"<sup>121</sup> the CRC recommended allowing the Legislature to exempt leasehold interests in governmentally owned property from ad valorem taxes.<sup>122</sup> To qualify for the exemption, the property had to be used "for a public purpose in connection with providing air, ground or water transportation or in providing services to the public in connection with such transportation, whether or not operated for profit."<sup>123</sup> Opponents of this measure labelled it a tax break for special interests, namely, big businesses that happened to lease government property for private purposes.<sup>124</sup> These opponents supported judicial and legislative decisions "which, in the interest

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114. 1978 GEN. ELECTION, *supra* note 72, at 28.

115. 1980 GEN. ELECTION, *supra* note 22, at 34 (adopting Fla. SJR 12-E, at 1779 (1980), amending FLA. CONST. art. VII, § 4(b)).

116. The constitution describes this "second gas tax" as, "[a] state tax . . . of two cents per gallon upon gasoline and other like products of petroleum and an equivalent tax upon other sources of energy used to propel motor vehicles . . ." FLA. CONST. art. XII, § 9(c)(1).

117. *Proposed Revision*, *supra* note 4, at 11 (proposed FLA. CONST. art. XII, § 9(c)(5)).

118. *Id.*

119. *Greenfield*, *supra* note 81, at 838.

120. 1980 GEN. ELECTION, *supra* note 22, at 34 (adopting Fla. SJR 824, at 1762 (1980), amending FLA. CONST. art. XII, § 9(c)(5)).

121. Bonnie Roberts, *Ad Valorem Taxation of Leasehold Interests in Governmentally Owned Property*, 6 FLA. ST. U. L. REV. 1085, 1085 (1978).

122. *Proposed Revision*, *supra* note 4, at 17 (proposed FLA. CONST. art. VII, § 3(d)).

123. *Id.* For an analysis of the history of and arguments supporting and opposing the leasehold issue, see *Roberts*, *supra* note 121.

124. See, e.g., Moyle, *supra* note 94 at B7.



of fairness, have restricted tax exemptions for leasehold interests to those instances where the government property is used by the leaseholder for a 'public purpose.'"<sup>125</sup> The opponents prevailed in 1978,<sup>126</sup> and again in 1992 when the Taxation and Budget Reform Commission placed a similar issue before voters.<sup>127</sup>

### III. PROCEDURAL PROPOSALS

The CRC sought not only to secure clearer and fairer rights for Florida citizens, but also to produce a government that was more efficient and responsive. To that end, it recommended numerous procedural changes, many of which were ultimately adopted.<sup>128</sup> Generally, these proposals were aimed at various degrees of reform in the three branches of government.

#### A. *Proposals Affecting Legislative Procedures*

Two of the CRC's proposals directly affecting legislative procedures ultimately became incorporated into Florida law.

*First Reading by Publication.* Before a bill could be considered by the Legislature, the clerk of each house had to read the bill aloud on three separate days, either by title or in its entirety if requested by one-third of the members present.<sup>129</sup> It took a supermajority (two-thirds) of the members present to waive this constitutional requirement.<sup>130</sup> The CRC suggested allowing the first reading to be accomplished by publication in a legislative journal, largely as a "timesaving measure."<sup>131</sup> Voters adopted this recommendation when the Legislature placed it on the ballot again in 1980.<sup>132</sup>

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125. *Id.*

126. 1978 GEN. ELECTION, *supra* note 72, at 28.

127. Letter from Tom Rankin, Florida Taxation and Budget Reform Commission, to Jim Smith, Secretary of State (May 7, 1992) (proposed FLA. CONST. art. VII, § 3) (on file with the Secretary of State).

128. *See infra* notes 129-47 and accompanying text.

129. FLA. CONST. art. III, § 7 (amended 1980).

130. *Id.*

131. *Williams, supra* note 34, at 1124.

132. 1980 GEN. ELECTION, *supra* note 22, at 34 (adopting Fla. SJR 1349 at 34 (1980), amending FLA. CONST. art. III, § 7).

*February Session.* School officials, who relied heavily on state funding for their budgeting, complained to the CRC that regular legislative sessions under the 1968 constitution—beginning in April and concluding in June<sup>133</sup>—failed to give them adequate time to prepare for the school year.<sup>134</sup> The CRC accordingly recommended sessions beginning in February.<sup>135</sup> In 1990, the Legislature once again placed the issue before voters, and it was adopted.<sup>136</sup>

### B. *Proposals Affecting Judicial Procedures*

Like proposals affecting legislative procedures, those relating to the operation of the judiciary were adopted after the CRC's work.

*County Court Impeachments.* Article III, section 17(a) provided that certain state officers, including all justices and judges except for county court judges, could be impeached "for misdemeanor in office."<sup>137</sup> In order to "provide equal treatment with respect to impeachment for county and circuit court judges[,]"<sup>138</sup> the CRC recommended applying this impeachment section to county court judges.<sup>139</sup> Voters did just that ten years after rejecting the CRC's recommendation.<sup>140</sup>

*Jurisdiction Over the Public Service Commission.* The CRC proposed that action of the Public Service Commission be reviewable by writ of certiorari to the Florida Supreme Court.<sup>141</sup> Voters substantially adopted this recommendation in 1980.<sup>142</sup>

133. FLA. CONST. art. III, §§ 3(b), (d) (amended 1990).

134. *Williams*, *supra* note 34, at 1122.

135. *Proposed Revision*, *supra* note 4, at 2 (proposed FLA. CONST. art. III, § 3(b)).

136. FLA. DEP'T. OF STATE, DIV. OF ELECTIONS, TABULATION OF OFFICIAL VOTES, FLA. GEN. ELECTION 85 (1990) (adopting Fla. SJR 1990, 2, (1990), amending FLA. CONST. art. III, § 3).

137. FLA. CONST. art. III, § 17(a) (amended 1988). The constitution provided discipline for county court judges only by suspension by the Governor. *Williams*, *supra* note 34, at 1130.

138. *Williams*, *supra* note 33, at 1130.

139. *Proposed Revision*, *supra* note 4, at 3 (proposed FLA. CONST. art. III, § 17(a)).

140. See 1988 GEN. ELECTION, *supra* note 111, at 53.

141. *Proposed Revision*, *supra* note 4, at 16 (proposed FLA. CONST. art. V, § 3(b)(3)). For a listing of CRC records reflecting discussions about this change, see *Williams*, *supra* note 34, at 1141 nn.17-21.

142. 1980 GEN. ELECTION, *supra* note 22, at 34 (adopting Fla. SJR 20-C (1979), amending FLA. CONST. art. V, § 3). The procedure for review was changed, however, from

*Judicial Nomination Procedures.* The CRC concluded that it was important that the twenty-six judicial nominating commissions in the state be constitutionally required to operate under a set of uniform rules of procedure.<sup>143</sup> Accordingly, it proposed that the supreme court be required to prescribe those uniform rules.<sup>144</sup> This recommendation was partially adopted in 1984.<sup>145</sup>

### C. *Proposals Affecting Executive and General Government Procedures*

Finally, in addition to legislative and judicial procedures, the CRC set the stage for some changes in the procedures of the executive branch of government. Among them was one affecting the Public Service Commission. The CRC recommended providing constitutional authority for the Public Service Commission and making its membership consist of five commissioners appointed by the Governor instead of three elected commissioners.<sup>146</sup> The 1978 Legislature made the latter change before the issue went on the ballot.<sup>147</sup>

## IV. CONCLUSION

The 1978 CRC succeeded, although not as it had intended.<sup>148</sup> The CRC hoped for a quick change to the Florida Constitution. Instead, the change has been gradual, with some recommendations being statutorily enacted rather than constitutionally adopted. Thus, despite the original appearance of failure on that bleak winter morning after the 1978 general election, the CRC has had a continuing, tremendous impact on Florida law

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certiorari to direct appeal. FLA. CONST. art. V, § 3.

143. *Williams*, *supra* note 34, at 1146.

144. *Proposed Revision*, *supra* note 4, at 4 (proposed FLA. CONST. art. V, § 3).

145. 1984 GEN. ELECTION, *supra* note 60, at 39 (adopting Fla. HJR 1160 (1984), amending FLA. CONST. art. V, § 11(d)). The resolution, proposed by the Legislature and ultimately adopted, removed the requirement that the supreme court prescribe the rules, allowing the JNC's themselves to do so, with legislative and supreme court oversight. See FLA. CONST. art. V, § 11(d).

146. *Proposed Revision*, *supra* note 4, at 16 (proposed FLA. CONST. art. IV, § 10).

147. Ch. 78-426, §§ 2-3, 1978 Fla. Laws 1419, 1420-23 (codified at FLA. STAT. §§ 350.01, 350.031 (1991)).

148. Florida voters may have intuitively understood this truth when, in 1980, they overwhelmingly rejected a ballot proposal to eliminate the CRC and its biennial review of the state constitution. See 1980 GEN. ELECTION, *supra* note 22, at 34.

and public policy in the last fifteen years. It turned out that waiting twenty years was not necessary.

Under the leadership of Sandy D'Alemberte, the CRC highlighted many significant public policy issues that had not been discussed or considered in Florida before. For this reason, the CRC continues to have a substantial impact on Florida law today. Some of the fifteen-year-old CRC recommendations remain current topics of debate. For example, the meaning of sexual equality is still unresolved.<sup>149</sup> Similarly, the CRC recommended gubernatorial appointment and merit retention, rather than election, for circuit and county court judges.<sup>150</sup> This idea, too, remains a topic of contemporary debate.<sup>151</sup>

Thus, the 1978 Constitution Revision Commission truly was ahead of its time. The work that served as a model since 1978 will continue to do so as Floridians prepare for the work of the 1998 Constitution Revision Commission and its suggested revisions to the state's most basic document of self-governance.

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149. See *supra* note 41.

150. *Proposed Revision*, *supra* note 4, at 16-17 (proposed FLA. CONST. art. V, §§ 10, 11).

151. For a persuasive argument favoring merit retention instead of election at the circuit and county court levels, see Leander Shaw, Jr., *Florida's Judicial Merit Selection and Retention System: The Better Alternative*, 20 FLA. ST. U. L. REV. 283 (1992).

# So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions

Jim Smith\*

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### I. INTRODUCTION

Residents of Florida have a specific right that citizens of many other states do not have.<sup>1</sup> They have the power to amend their state constitution by gathering a set number of signatures on petitions calling for an amendment to be placed on a statewide ballot for ratification.<sup>2</sup>

This is called the initiative method.<sup>3</sup> Prior to the 1968 revision of the Florida Constitution, amendments could be proposed only by Constitutional Convention<sup>4</sup> or in resolutions adopted by the Florida Legislature.<sup>5</sup> The

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\* Jim Smith was elected Florida's 21st Secretary of State on November 8, 1988, after serving 15 months as interim secretary by appointment of the governor. He was re-elected to a full term on November 6, 1990, becoming one of the few officials in state history elected to a different Cabinet post. Smith previously served two terms as Attorney General.

A native Floridian, he was born on May 25, 1940, in Jacksonville and attended public schools there until his father's work took the family to North Africa and Spain. He completed high school at an American school in Zaragosa, Spain and upon his return to the states attended Florida State University, earning a degree in Government and Public Administration. Commissioned in the Army Reserve in 1962, Smith served two years as a tank officer and then returned to Florida to earn a law degree at Stetson University.

Before being elected Attorney General in 1978, Smith spent 10 years in private and high level government service, including posts as Deputy Secretary of State, Deputy Secretary of Commerce, Senior Executive Assistant to the Governor and member of the Board of Regents of the State University System.

1. See generally TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 146-52 (1991).

2. FLA. CONST. art. XI, § 3.

3. *Id.*

4. FLA. CONST. of 1885, art. XVII, § 2 (1966).

5. FLA. CONST. of 1885, art. XVII, § 4 (1964).

1968 revision added an automatic meeting of the Constitution Revision Commission (the "Commission") ten years after the adoption of the revised constitution and every twenty years thereafter.<sup>6</sup> The first Commission was organized in 1977 and submitted eight amendments to voters. All were rejected. The next Commission is scheduled to begin deliberations in 1997.

Still another way to amend the constitution was adopted by the voters in 1988 when they created the Florida Tax and Budget Reform Commission to review taxation and budget issues decennially.<sup>7</sup> The Commission was given authority to put amendments on the ballot.<sup>8</sup>

The Commission met for the first time in 1990<sup>9</sup> and, after two years of public hearings, placed four amendments on the 1992 general election ballot. One amendment was removed by the Supreme Court of Florida prior to the election;<sup>10</sup> two of the three that appeared on the ballot were adopted.

Earlier Florida Constitutions provided for a referendum to amend or revise the constitution.<sup>11</sup> A referendum is first proposed by the Legislature and then decided by the voters at a general election.<sup>12</sup> Initiatives, by contrast, originate with the people and do not require legislative approval.<sup>13</sup>

Amendments by the initiative process are increasingly popular. As of January 1994, there were nineteen constitutional initiative committees at work collecting signatures around the state.<sup>14</sup> However, this is not an easy task. Since 1976, only ten of some sixty-five attempts have accrued the required number of signatures. Of them, two were removed by the Supreme Court of Florida prior to the general election for not meeting the legal requirements for initiatives.<sup>15</sup> Five of the remaining eight were adopted.

6. FLA. CONST. art. XI, § 2(a).

7. *Id.* § 6(a).

8. *See id.* § 6(c).

9. *Id.* § 6(a).

10. *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 622 (Fla. 1992).

11. *See* FLA. CONST. of 1885, art. XVII, § 4 (1964).

12. *See id.*

13. *See* FLA. CONST. art. XI, § 3.

14. American Dream in Florida, American Family Political Committee of Florida, The Campaign for Florida's Future, Committee to Elect the Public Service Commission, Citizens for a Safe Florida, Citizens Protecting Their Rights to Elect Florida Sheriffs, Education First Committee, Enough is Enough, Fair Ballot Access Committee, Florida Pension Reform Committee, Florida State Lodge - Fraternal Order of Police, Home Rule Committee, The Human Rights Task Force, Save Our Everglades Political Action Committee, Save Our Sealife Committee, SOS Foundation, Inc., Take Back America, Tax Cap Committee (filed three separate petitions), Taxpayer Association.

15. *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984, 993 (Fla. 1984).

The following made ballot position:

- 1976     Ethics in Government: Adopted<sup>16</sup>
- 1978     Casino Gambling: Not adopted
- 1984     Citizens' Choice on Government Revenue: Removed from  
ballot by court<sup>17</sup>
- 1984     Citizens' Rights on Civil Actions: Removed from ballot by  
court<sup>18</sup>
- 1986     State Operated Lotteries: Adopted<sup>19</sup>
- 1986     Casino Gambling: Not adopted
- 1988     Limitation of Non-Economic Damages: Not adopted
- 1988     English is the Official Language of Florida: Adopted<sup>20</sup>
- 1992     Eight is Enough: Adopted
- 1992     Save Our Homes: Adopted

## II. A STEP-BY-STEP GUIDE TO AMENDING FLORIDA'S CONSTITUTION BY INITIATIVE

1. Contact the Department of State's Division of Elections<sup>21</sup> and request a free packet of information. You will receive a packet which includes the 1994 initiative petition information, a handbook for committees, all pertinent laws and rules, and necessary forms for filing as a political committee.

2. Sponsors must register as a political committee with the Division of Elections,<sup>22</sup> before circulating a petition.<sup>23</sup> The division will furnish the sponsors with all necessary information on how to form a committee and the duties of a committee.

Committees are advised to begin work at least four years before the election in order to have sufficient time to gather the necessary signatures

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16. FLA. CONST. art. II, § 8.

17. *Fine*, 448 So. 2d at 993.

18. *Evans*, 457 So. 2d at 1355.

19. FLA. CONST. art. X, § 15.

20. *Id.* art. II, § 9.

21. The Division of Elections' address is 1801 The Capitol, Tallahassee, Florida 32399-0250; telephone (904) 488-7690; fax (904) 488-1768.

22. As required by section 106.03 of the Florida Statutes. *See* FLA. STAT. § 106.03 (1991).

23. *Id.* § 106.03(1).

and deal with any legal challenges that might arise. However, some committees have made ballot position in less than two years.

3. Sponsors must submit the text of the proposed amendment to the Secretary of State<sup>24</sup> for review.<sup>25</sup> The Secretary approves the form of the petition, but not its legal sufficiency.<sup>26</sup> The form will be checked for completeness,<sup>27</sup> for the correct number of words in the ballot title (fifteen or less) and in the summary (seventy-five or less),<sup>28</sup> and for correct size and format of the petition.<sup>29</sup> Once approved, the petition can be circulated to obtain signatures of registered voters.<sup>30</sup>

4. When at least ten percent of the required number of signatures from one-quarter of the congressional districts is collected, the Secretary of State shall submit the petition language to the Attorney General, who will then forward the petition to the Supreme Court of Florida for an advisory opinion on whether the text conforms to the requirements of article XI, section 3 of the Florida Constitution.<sup>31</sup> The court will also determine if the ballot title and summary of the amendment comply with section 101.161 of the Florida Statutes.<sup>32</sup>

5. Sponsors must deliver the petitions to the supervisors of elections in order for the signatures to be verified,<sup>33</sup> a process that can take several weeks or longer if the supervisor's staff is extremely busy. Verification will usually take less time if signature cards are submitted as they are collected and the final group is submitted several months before the deadline.

Once certified as having obtained the necessary number and distribution of signatures of registered voters, certification is sent to the Division of Elections by the supervisor of elections. The actual petitions are retained

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24. The Secretary of State's responsibilities for initiatives are handled by the Division of Elections of the Department of State.

25. FLA. STAT. § 100.371(3) (1991); FLA. ADMIN. CODE ANN. r. 1S-2.009(1) (1990).

26. FLA. ADMIN. CODE ANN. r. 1S-2.009(1) (1990).

27. *See id.* r. 1S-2.009.

28. FLA. STAT. § 101.161(1) (1991).

29. FLA. ADMIN. CODE ANN. r. 1S-2.009(2) (1990).

30. *See id.*

31. FLA. STAT. § 16.061(1) (1991); *see also* FLA. CONST. art. XI, § 3 (listing the requirements).

32. *See infra* notes 49-53 and accompanying text.

33. FLA. STAT. § 15.21(3) (1991); *see also id.* § 99.097 (detailing the process by which signatures are verified).



by the supervisor of elections. Any initiative which receives the required number of signatures no later than ninety-one days prior to the general election will appear on the ballot, unless successfully challenged in court.<sup>34</sup>

If an initiative comes under legal challenge, it is up to the sponsor or other interested persons to defend it in court. The deadline for the supervisors to submit signature verification to the Division is 5:00 p.m., August 9, 1994, for the November 1994 general election.

### III. FREQUENTLY ASKED QUESTIONS

The following are frequently asked questions regarding the initiative process in Florida:

#### *How are political committees formed?*

A political committee is defined as two or more persons or individuals supporting or opposing candidates, issues, or political parties and which accepts contributions or makes expenditures of more than \$500 a year.<sup>35</sup> Furthermore, a sponsor of an amendment must always register as a political committee regardless of the number of persons involved and regardless of the amount of money raised or spent.<sup>36</sup>

Under section 106.03(2) of the Florida Statutes, a political committee must furnish the following information when it files a statement of organization with the Division of Elections:

- (a) The name and address of the committee;
- (b) The names, addresses, and relationships of affiliated or connected organizations;
- (c) The area, scope, or jurisdiction of the committee;
- (d) The name, address, and position of the custodian of the books and accounts;
- (e) The name, address, and position of other principal officers, including officers and members of the finance committee, if any;
- ...
- (g) Any issue or issues such organization is supporting or opposing;
- ...
- (i) A statement of whether the committee is a continuing one;
- (j) Plans for the disposition of residual funds which will be made in the

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34. FLA. CONST. art. XI, § 5(a).

35. FLA. STAT. § 106.011(1) (1991).

36. *Id.*

event of dissolution [of the committee];

(k) A listing of all banks, safe-deposit boxes, or other depositories used for committee funds; and

(l) A statement of the reports to be filed by the committee with federal officials, if any, and the names, addresses, and positions of such officials.<sup>37</sup>

*How many signatures must be collected?*

The number of signatures must equal eight percent of the voters in the most recent presidential election.<sup>38</sup> Currently, the number is 429,428. To assure statewide coverage, the signatures must be from at least half the congressional districts,<sup>39</sup> currently twelve of the twenty-three districts.

*How do I know how many votes are required from each district and how many registered voters are in each district?*

That information is part of the initial informational packet provided by the Division of Elections..

*How long are the signatures valid?*

Every signature must be dated when made and is valid for four years from that date.<sup>40</sup>

*What appears on an initiative petition?*

The Division of Elections has a rule providing the format of the constitutional amendment petition form.<sup>41</sup> The minimum size of the petition is 3" x 5", the maximum size 8 ½" x 11". The form must contain the signature of the voter, the date signed, and the printed name of the voter including address, precinct number, congressional district and county. However, if the voter does not know the precinct number, congressional district and county, the supervisor of elections will certify the signature if the supervisor is able to ascertain that the person is a registered voter. The form must contain the ballot title, the ballot summary and the full text of the proposed amendment. There are no specifications on what kind of paper the petition should be on, but many sponsors have used card stock since the forms will be handled several times by various people. Only one signature

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37. *Id.* § 106.03(2).

38. FLA. CONST. art. XI, § 3.

39. *Id.*

40. FLA. STAT. § 100.371(2) (1991); FLA. ADMIN. CODE ANN. r. 1S-2.009(1), (2) (1990).

41. FLA. ADMIN. CODE ANN. r. 1S-2.009 (1990).

can be on each form.<sup>42</sup>

*Does the Secretary of State's office assist in writing the petition language?*

No. Anyone considering sponsoring an amendment should consult an attorney for assistance in wording the proposal.

*May the petitions be in a language other than English?*

Some petitions have been circulated with English on one side of the form and Spanish on the other. In 1988, voters adopted a constitutional initiative proclaiming English as the official language of Florida.<sup>43</sup> However, there have been no judicial decisions indicating whether a petition must be in English.

*How are the signatures verified?*

Employees in the local supervisor of elections' office compare the signatures, names and addresses to voter rolls.<sup>44</sup> In some counties, they must be compared by hand. Other counties have voter information on computer file. Signatures of persons who are not registered voters of the county, who were purged from the voter rolls for not voting in two years<sup>45</sup> or who have signed the petition more than once are rejected. People who did not furnish complete information (missing an address, for example), whose signatures do not match those on file or who have illegible handwriting may prevent the supervisor from being able to determine the person's voter registration status.

When verification is completed, the supervisor sends the Division of Elections a certificate detailing how many signatures were submitted, how many were valid and the distribution by congressional district. If committee members want to know how many signatures have been verified, it must contact the Division of Elections. The supervisor of elections will explain why signatures were rejected if requested.

*How much does it cost to have the signatures verified?*

Either the actual cost to the supervisor or ten cents per name, whichever is less.<sup>46</sup> If a political committee states that it is unable to pay

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42. See *id.*

43. FLA. CONST. art. II, § 9.

44. FLA. STAT. § 99.097 (1991).

45. Op. Div. Elect. Fla. 91-04, 91-01, 88-38, 88-10, 87-16.

46. FLA. STAT. § 99.097(4) (1991).

for the verification due to financial hardship, payment is waived after certification of this is made to the supervisor.<sup>47</sup>

*How long does it take to verify signatures?*

It varies, but committees should keep in mind that as the election date approaches, the supervisor's office becomes increasingly busy. If petitions are submitted too close to the deadline, it is possible that there will not be sufficient time to check them all. Several weeks lead time is recommended at a minimum.

*On what basis are most constitutional initiatives challenged in court?*

Some initiatives have encountered court challenges alleging that they do not comply with the single-subject requirements of article XI, section 3 of the Florida Constitution<sup>48</sup> and the ballot title and summary requirements of section 101.161 of the Florida Statutes.<sup>49</sup>

In 1972 the constitution was amended to limit initiative amendments to "one subject and matter directly connected therewith," better known as the single-subject requirement, and to provide that such an amendment or revision could be made to any "portion or portions" of the constitution rather than to a section.<sup>50</sup> In addition, section 101.161 of the Florida Statutes requires that any constitutional amendment or other public measure submitted to the vote of the people must:

1. Be answered by a yes or no response. A yes vote indicates approval of the proposal; a no vote indicates rejection of the proposal.
2. Along with the actual wording of the amendment, have a summary of no more than seventy-five words and a title of no more than fifteen words.
3. The summary must be in "clear and unambiguous language."<sup>51</sup>

*How can an amendment be protected from a court challenge?*

Prior to 1987, there was no way to get any type of court review before an initiative made ballot position. The Legislature then amended chapters 15 and 16 of the Florida Statutes, relating to the Secretary of State and Attorney General, to provide that when ten percent of the necessary

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47. *Id.*

48. *See, e.g., Fine*, 448 So. 2d at 985.

49. *See, e.g., Smith*, 606 So. 2d at 621.

50. FLA. CONST. art. XI, § 3.

51. FLA. STAT. § 101.161(1) (1991).

signatures is obtained from twenty-five percent of the congressional districts required, the Secretary will submit the petition to the Attorney General.<sup>52</sup> Within thirty days after receipt, the Attorney General petitions the Supreme Court of Florida requesting an advisory opinion on the initiative's conformity with article XI, section 3 of the Florida Constitution and with section 101.161 of the Florida Statutes.<sup>53</sup> In addition, the Attorney General may enumerate any specific factual issues that require a judicial determination.<sup>54</sup>

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52. *Id.* § 15.21.

53. *Id.* § 16.061(1).

54. *Id.*

# Some Proposed Changes to the Florida Constitution

Thomas C. Marks, Jr.  
Alfred A. Colby

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\* B.S., 1960 Florida State University; LL.B., 1963 Stetson University; Ph.D., 1971 University of Florida. Professor of Law, Stetson University.

\*\* B.S., 1981 Duke University; J.D. Stetson University 1993. Upon admission to The Florida Bar, Mr. Colby expects to become an associate with the firm of Ketchey, Horan, Hearn, Neukamm and Baumann, P.A., in Tampa.

In this article, a number of changes to the Florida Constitution are proposed, and the reasons for proposing them are stated. Due to the fact that this is a collaborative piece, the authors felt that the reader should understand that the sections proposing changes in Florida Constitution article V, section 3(b)(3); article VII, section 10(c) and article XI, section 3 were written by Professor Marks; the sections proposing changes in Florida Constitution article I, section 11; article III, section 8(a) and article VII, section 1(b) were written by Mr. Colby.

VII. ARTICLE XI, SECTION 3: THE REHABILITATION OF THE CONSTITUTIONAL RIGHT OF THE PEOPLE TO PROPOSE CHANGES TO THE FLORIDA CONSTITUTION— UNDOING THE MALIGNANT EFFECT OF <i>FINE V.</i> <i>FIRESTONE</i> . . . . .	1572
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## I. INTRODUCTION

It may be said that each generation should possess the right to construe or interpret our Constitution in the light of his daily needs in a complex society rather than in the light of now obsolete conditions and circumstances of the past. It is unjust to chain modern society to the views and opinions of eminent jurists of former generations not acquainted with our present day problems.<sup>1</sup>

In spite of this ability to informally amend the constitution by interpretation, there are situations when formal amendments are needed to ratify these interpretations. There are other situations when the constitution needs to be formally changed to correct either a deficiency that has surfaced in the document itself or in its interpretation by the judiciary. The changes proposed below address each of these situations.

## II. ARTICLE I, SECTION 11: SUGGESTED CHANGES REGARDING IMPRISONMENT FOR DEBT

Florida has constitutionally prohibited imprisonment for debt since 1868.<sup>2</sup> Such prohibitions were added to the constitutions of several states as a reaction to the common abuses of debtor's prisons during the early and middle 1800's.<sup>3</sup> However, a number of exceptions to the prohibition have been recognized over the years. In Florida, cases involving fraud are expressly excepted.<sup>4</sup> In addition, Florida courts have generally allowed

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1. *Florida Power Corp. v. Pinellas Util. Bd.*, 40 So. 2d 350, 355 (Fla. 1949).

2. "No person shall be imprisoned for debt, except in cases of fraud." FLA. CONST. art. I, § 11; FLA. CONST. of 1885, art. I, § 16; FLA. CONST. of 1868, art. I § 16.

3. See *Shidlowsky v. National Car Rental Sys., Inc.*, 344 So. 2d 903, 904 (Fla. 3d Dist. Ct. App. 1977) (Hubbart, J., concurring); *Vermont Nat'l Bank v. Taylor*, 445 A.2d 1122, 1124 (N.H. 1982); *Brantley v. Brantley*, 344 P.2d 731, 733 (Wash. 1959).

4. FLA. CONST. art I, § 11; FLA. CONST. of 1885, art. I, § 16; FLA. CONST. of 1868, art. I, § 16.

imprisonment to enforce payment of domestic relations support obligations<sup>5</sup> and tax obligations,<sup>6</sup> even though each can easily be characterized as a "debt."<sup>7</sup> This section of this article will outline the historical background of each of the court-developed exceptions,<sup>8</sup> and then recommend changes to article I, section 11.<sup>9</sup> This article will not address issues involving imprisonment for debts which arise from criminal acts,<sup>10</sup> nor imprisonment for acts which relate to debts, but do not constitute a per se failure to pay the underlying obligation.<sup>11</sup>

### A. Domestic Relations Support Obligations

It is almost axiomatic that Florida court orders awarding alimony<sup>12</sup> or child support<sup>13</sup> may be enforced by civil contempt, whereby the non-paying party is confined to the county jail until he or she pays the ordered support.<sup>14</sup> The rationale for allowing imprisonment for failing to pay

5. See *infra* notes 12-28 and accompanying text.

6. See *infra* notes 29-31 and accompanying text.

7. "A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future." BLACK'S LAW DICTIONARY 363 (5th ed. 1979). Florida courts have yet to precisely define "debt" as it is used in article I, section 11. Instead, they seemingly prefer to define it by pointing out what obligations are not a "debt." See *infra* text accompanying notes 15 and 30.

8. See *infra* notes 12-28, 29-31 and accompanying text.

9. See *infra* text accompanying notes 32-36.

10. For example, imprisonment imposed for failing to pay fines or penalties. See generally *State ex rel. Lanz v. Dowling*, 110 So. 522 (Fla. 1926) (prohibition applies only to obligations which arise *ex contractu*); *State v. Champe*, 373 So. 2d 874 (Fla. 1978) (requiring payment into victim's compensation fund as a condition of probation does not violate article I, section 11).

11. The classic example is imprisonment for writing bad checks, which does not implicate the prohibition of imprisonment for debt because "the purpose [of the Legislature] was not for the collection of debts. The purpose was to penalize the evil of putting into circulation certain kinds of worthless commercial paper and thus causing mischief to banks and to trade and commerce." *Ennis v. State*, 95 So. 2d 20, 23 (Fla. 1957); *State v. Berry*, 358 So. 2d 545 (Fla. 1978).

12. *Bronk v. State*, 31 So. 248 (Fla. 1901); *State ex rel. Krueger v. Stone*, 188 So. 575 (Fla. 1939).

13. *Ex parte J.C.H.*, 17 Fla. 362 (1879); *Spencer v. Spencer*, 311 So. 2d 822 (Fla. 3d Dist. Ct. App. 1975).

14. Of course, since imprisonment is involved, observance of various procedural safeguards is necessary. First, when civil contempt is used to obtain compliance with a court order, the person to be held in contempt must have the ability to comply, or else imprisonment will not serve its coercive purpose. On the other hand, criminal contempt, which is used to punish willful violation of a court order, carries with it the procedural safeguards of



support, in the face of the constitutional prohibition, is that domestic support "is not a debt, within the meaning of the constitutional inhibition against imprisonment for debt. It is regarded more in the light of a personal duty due not alone from the husband to the wife, but from him to society . . ."<sup>15</sup> In addition, imprisonment for failing to pay support obligations has occasionally been based upon the failure of the non-paying party to obey a lawful court order.<sup>16</sup> Regardless, the fact remains that alimony and child support orders have always been, and continue to be, enforceable by contempt.

Since the early 1980's, Florida has expanded the contempt power of the courts beyond enforcement of domestic support orders contained in the dissolution decree proper. Imprisonment is now available to enforce money judgments arising from unpaid support obligations<sup>17</sup> and child support

any criminal proceeding. See *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985).

A second, and equally important, prerequisite for imposition of contempt is that the party to be held in contempt must be in violation of an express order of the court, and not simply in violation of a provision in an agreement between the parties. See *Solomon v. Solomon*, 5 So. 2d 265 (Fla. 1942) (court has no power to find former husband in contempt for failing to pay alimony, since the court did not expressly order the former husband to comply with the terms of the settlement agreement); *Holmes v. Coolman*, 401 So. 2d 895 (Fla. 4th Dist. Ct. App. 1981) (court order can not hold spouse in civil contempt for violation of a private agreement).

15. *Bronk*, 31 So. at 252.

16. See *Orr v. Orr*, 192 So. 466 (Fla. 1939); *Murphy v. Murphy*, 370 So. 2d 403 (Fla. 3d Dist. Ct. App. 1979.) However, such a rationale ignores the fact that a court's ability to enforce its own orders is also limited by the prohibition contained in article 1, section 11. Otherwise, rather than enter a money judgment in a non-domestic civil case, a court could order payment, and then hold the debtor in contempt and imprison him for failing to pay the ordered amount.

17. FLA. STAT. § 61.17(3) (1985); *Gibson v. Bennett*, 561 So. 2d 565 (Fla. 1990). Traditionally, enforcement of money judgments by contempt has been prohibited by article I, section 11. See *Tabas v. Hudson*, 175 So. 2d 224 (Fla. 3d Dist. Ct. App. 1965). However, since as early as 1944, Florida allowed foreign money judgments arising from domestic support orders to be domesticated and enforced by contempt. *McDuffie v. McDuffie*, 19 So. 2d 511 (Fla. 1944) (Georgia judgment); *Sackler v. Sackler*, 47 So. 2d 292 (Fla. 1950) (New York judgment). The basis for this exception to the general rule was that:

a judgment for alimony rests largely on public policy in that the husband should be required to support his wife and children, that they should not become derelicts and a charge on the public, that a judgment in equity is more efficacious than a judgment at law in that it may be enforced by attachment or contempt . . . .

*McDuffie*, 19 So. 2d at 513 (citing *Fanchier v. Gammill*, 114 So. 813 (Miss. 1927)). However, in spite of the availability of equitable remedies to enforce foreign judgments, Florida continued to recognize that an enforcing spouse had to choose between equitable and

arrearages that are sought to be enforced after the supported child attains

legal remedies. *Haas v. Haas*, 59 So. 2d 640 (Fla. 1952).

Florida courts continued to follow the traditional rule in cases involving Florida money judgments which were based upon domestic support arrearages, *see State ex rel. Clark v. Muldrew*, 308 So. 2d 136 (Fla. 4th Dist. Ct. App. 1975), although there were some signs that the courts recognized the inconsistency inherent in distinguishing foreign and domestic judgments. *See Grotnes v. Grotnes*, 338 So. 2d 1122 (Fla. 4th Dist. Ct. App. 1976) (receding from *State ex rel. Clark*). Nevertheless, in two cases in the early 1980's, the Florida Supreme Court hinted that equitable remedies in general, and the contempt power in particular, would not be available to enforce domestic money judgments arising from domestic support orders. *See Sokolsky v. Kuhn*, 405 So. 2d 975 (Fla. 1981) (money judgment for child support arrearages is not enforceable by equitable remedy of garnishment because a money judgment does not trigger the domestic support order exception to the general prohibition on garnishment of wages); *see also* FLA. STAT. §§ 61.12, 222.11 (1979); *Lamm v. Chapman*, 413 So. 2d 749, 753 (Fla. 1982). In *Lamm*, the court reasoned that:

In the event that such a [money] judgment is obtained, it constitutes a judgment debt upon which execution may issue and for which traditional enforcement remedies, including liens and levies, may be utilized. The contempt power of the court is no longer available to enforce the child support obligation for those arrearages which have been reduced to a judgment debt for which execution may issue . . . .

*Id.* The Legislature addressed the choice of remedies problem raised by *Lamm* by amending section 61.17 of the Florida Statutes to provide that "[t]he entry of a judgment for arrearages for child support, alimony, or attorney's fees and costs does not preclude a subsequent contempt proceeding . . . for failure of an obligor to pay the child support, alimony, and attorney's fees, or cost for which the judgment was entered." Ch. 86-220, § 125, 1986 Fla. Laws 1603, 1710 (amending Fla. Stat. § 61.17(3) (1987)).

Passage of chapter 86-220, section 125 did not resolve the constitutional issue, however. That was accomplished by the Florida Supreme Court in its decision in *Gibson*, in which the court relied upon the *McDuffie* and *Sackler* line of cases in holding that the use of the contempt power to enforce payment of money judgments based upon domestic support arrearages does not violate article I, section 11. *Gibson*, 561 So. 2d at 565. The court dismissed the language of *Lamm* as dicta, and found that neither *Lamm* nor *Sokolsky* addressed the issue directly. Instead, the court, per Justice Kogan, held that:

[e]stablishing a support decree as a money judgment does not destroy the decree as an order to pay support nor is the obligation reduced to an ordinary judgment debt enforceable only at law. . . . The purpose of the award remains the payment of support to the former spouse or the children regardless of its form or the location of the parties. A decree for support is different than a judgment for money or property: It is a continuing obligation based on the moral as well as legal duty of a parent to support his or her children. Because of this difference, a judgment for support should be enforced by more efficient means than ordinary execution at law.

*Id.* at 569 (citations omitted). Not only did *Gibson* resolve the constitutional issue, it also resolved the choice of remedies issue originally raised in *Haas* by effectively abrogating the doctrine in cases involving domestic support. *Id.* at 572 (Overton, J., concurring).

majority.<sup>18</sup> Furthermore, the Department of Health and Rehabilitative Services may seek contempt to compel reimbursement of welfare expenditures from non-paying spouses.<sup>19</sup> The justification for each of these

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18. *Gibson*, 561 So. 2d at 565. Prior to *Gibson*, Florida courts uniformly followed the rule that contempt was not available to enforce child support arrearages once the supported child reached majority. See *Heath v. Killian*, 556 So. 2d 410 (Fla. 1st Dist. Ct. App. 1989) (question certified due to pendency of *Gibson* in the Florida Supreme Court); *State ex rel. Sipe v. Sipe*, 492 So. 2d 679 (Fla. 1st Dist. Ct. App.), *review dismissed*, 492 So. 2d 1331 (Fla. 1986) (URES enforcement action); *Smith v. Morgan*, 379 So. 2d 1052 (Fla. 1st Dist. Ct. App. 1980); *Gersten v. Gersten*, 281 So. 2d 607 (Fla. 3d Dist. Ct. App. 1973); *Wilkes v. Revels*, 245 So. 2d 896 (Fla. 1st Dist. Ct. App. 1970). The rationale for such a rule was that the supported children were no longer in need of support when they attained majority, and therefore, the justification for allowing the use of the extraordinary remedy of contempt in the face of article I, section 11, no longer existed. *Wilkes*, 245 So. 2d at 898; *Heath*, 556 So. 2d at 412.

The *Gibson* court, while acknowledging a split on the issue among other states, chose to align itself with those which allow contempt to be used to enforce child support arrearages post-majority. *Gibson*, 561 So. 2d at 572. The court relied mainly upon a public policy argument:

Upon emancipation of a minor child, the support-dependent parent is not magically reimbursed for personal funds spent nor debts incurred due to nonpayment of child support. Hardships suffered by a family do not disappear. A family's feelings of indignation from abandonment by the nonpaying parent or from past reliance on public assistance are not forgotten. Society's interest in ensuring that a parent meets parental obligations must not be overlooked simply because the child has attained the age of majority. The support obligation does not cease; rather it remains unfulfilled. The nonpaying parent still owes the money.

Today, support-dependent parents and the courts often experience great difficulty obtaining compliance with support orders while a child is a minor even though the remedy of contempt is available. If the courts lack the power to enforce child support orders through contempt proceedings after the child reaches majority, a nonpaying parent may escape his or her support obligation entirely, especially a parent with little or no property subject to attachment in an action at law. If a parent dependent on support is left with less effective civil action, the non paying parent may be encouraged to hide assets or purposefully elude the court until the child attains age eighteen, preferring the civil action on a debt rather than a contempt proceeding. As this court has previously stated, we have no desire to make this state a haven for those who wish to avoid their support obligations.

*Id.* (citation omitted). The court also relied to a lesser extent upon the provision of the Revised Uniform Reciprocal Enforcement of Support Act, which allows the post-majority enforcement of child support arrearages by contempt. *Id.* at 572 n.6 (citing FLA. STAT. § 881.101 (1989)).

19. *Lamm*, 413 So. 2d at 749. Traditionally, Florida courts have recognized "the basic principle that only obligations of the parties to the marriage relationship, owed to each other,

expansions of the contempt power is the state's vital interest in the efficient enforcement of support obligations, regardless of the form such obligations take.<sup>20</sup> As a result, there can be little doubt that Florida now allows enforcement by contempt of any obligation related to domestic support,<sup>21</sup>

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are to be treated differently from 'debts' for which imprisonment may not be imposed under the constitution." *Price v. Price*, 382 So. 2d 433, 437, (Fla. 1st Dist. Ct. App. 1980) (footnote omitted). However, in 1976, the Legislature enacted chapter 76-220, section 4, of the Laws of Florida, which provided that upon the payment of public assistance moneys for the benefit of a support-dependent child, the Department of Health and Rehabilitative Services ("HRS") became subrogated to the rights of the custodial parent to the extent of the public assistance, and that such payment created a "debt due and owing" to HRS from the non-paying supporting parent, but made no provision for the use of contempt by HRS. FLA. STAT. § 409.2561 (1977) (the Legislature revised section 409.2561 in 1982, changing "debt" to "obligation", and providing expressly for the use of contempt in enforcement actions.) The main issue raised by section 409.2561 as it was originally enacted was whether contempt is a remedy available to HRS to obtain reimbursement from a nonpaying parent, and the Second and Third District Courts of Appeal split on the issue, creating a conflict. *Chapman v. Lamm*, 388 So. 2d 1048 (Fla. 3d Dist. Ct. App. 1980) (the state has no greater right to enforce a debt as a third party assignee than does a private litigant); *Andrews v. Walton*, 400 So. 2d 790 (Fla. 2d Dist. Ct. App. 1981) (the fact that the state, rather than the supported parent, prosecutes an action to enforce support does not change the support nature of the obligation).

In *Lamm*, the Florida Supreme Court agreed with the rationale of the Second District in *Andrews*, holding that HRS could seek enforcement of a reimbursement action by contempt without violating article I, section 11 of the constitution. *Lamm*, 413 So. 2d at 750. First the court found no legislative intent to prohibit the use of contempt in its use of the word "debt" in the statute. The court then turned to the public policy argument.

[T]he state has historically occupied two roles with respect to family matters: that of an interested party in matters pertaining to the custody, support, and welfare of children and that of the sovereign having a *parens patriae* interest in the well-being of the minor child. . . . While it is true that . . . a private third party cannot use civil contempt to enforce a debt which is grounded in an assignment of a financial obligation resulting from a marriage dissolution or child support order, the state is not the same as a third party bank. The state is acting both as an interested party and as *parens patriae* to further the best interest of the dependent child.

*Id.* at 753.

20. See *Gibson*, 561 So. 2d at 565; *Lamm*, 413 So. 2d at 749; see generally *supra* notes 17-19.

21. Florida law provides for the award of attorney's fees and court costs ("suit money") in domestic cases where the requesting party can show need and the other party's ability to pay. FLA. STAT. § 61.14 (1991). Such awards are considered "support" for purposes of determining whether they may be enforced by contempt, since such fees and costs are a necessity to the spouse receiving the award. *Orr*, 192 So. 2d at 466. Of course, many types of property arrangements between parties to a divorce may be considered "necessities" as well. See *infra* notes 22-26 and accompanying text.

even if the obligation is not an order in a dissolution decree. Further, such enforcement does not implicate the prohibition on imprisonment for debt.

However, even with the expansion of contempt power described above, property settlements are not generally subject to enforcement by contempt.<sup>22</sup> Yet, the courts have, on occasion, used their contempt power to enforce provisions of property settlements where the provision is an action required of one of the parties<sup>23</sup> or where the property provision may be characterized as support.<sup>24</sup> Furthermore, with the adoption of equitable

22. See *State ex rel. Cahn v. Mason*, 4 So. 2d 255 (Fla. 1941); *Finney v. Finney*, 603 So. 2d 92 (Fla. 5th Dist. Ct. App. 1992); *Marks v. Marks*, 457 So. 2d 1137 (Fla. 1st Dist. Ct. App. 1984); *Carlin v. Carlin*, 310 So. 2d 403 (Fla. 4th Dist. Ct. App. 1975); *State ex rel. Gillham v. Phillips*, 193 So. 2d 26 (Fla. 2d Dist. Ct. App. 1966). Whether a payment required by a dissolution decree involves support or property is to be determined based on the function served by the payment, and not only upon the labels used in the decree. *Howell v. Howell*, 207 So. 2d 507 (Fla. 2d Dist. Ct. App. 1968).

23. See *Riley v. Riley*, 509 So. 2d 1366 (Fla. 5th Dist. Ct. App. 1987) (failure to name former spouse beneficiary of a life insurance policy); *Pennington v. Pennington*, 390 So. 2d 809 (Fla. 5th Dist. Ct. App. 1980) (failure to convey interest in marital home); *Firestone v. Ferguson*, 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979) (failure to sign sale papers on property); *Burke v. Burke*, 336 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1976) (failure to execute documents). The justification for the use of contempt in these situations is that the party failing to act is in willful disobedience of a court order requiring such action. *Riley*, 509 So. 2d at 1366. Of course, if the action required is the payment of money, then traditional concerns involving imprisonment for debt are implicated and should be raised. See *supra* note 16. But see *Murphy v. Murphy*, 370 So. 2d 403 (Fla. 3d Dist. Ct. App. 1979) (former husband could be held in contempt for failing to pay wife \$108,000 as a special equity upon a showing by the former wife that such failure was willful and that the former husband had the ability to make the payment); *Hazelwood v. Hazelwood*, 345 So. 2d 819 (Fla. 4th Dist. Ct. App. 1977) (former husband held in contempt for failing to pay former wife for her interest in intangible marital property).

24. See *Pabian v. Pabian*, 480 So. 2d 237, 238 (Fla. 4th Dist. Ct. App. 1985). The *Pabian* court stated:

We believe that the husband's obligation to pay the wife's automobile payments is in the nature of support rather than a settlement of property rights because of the prominent role which an automobile plays in our everyday life. Like food, clothing and shelter it has become a virtual necessity and thus falls within the penumbra of support and maintenance.

*Id.*; *Cobb v. Cobb*, 399 So. 2d 479 (Fla. 1st Dist. Ct. App. 1981) (failure to make ordered payments on household furnishings). In addition, Florida courts have generally held that "lump sum alimony," which is often used as a means to equitably distribute property, is supportive in nature, and therefore enforceable by contempt. See *McCombes v. McCombes*, 440 So. 2d 683 (Fla. 1st Dist. Ct. App. 1983) (lump sum alimony awarded in lieu of award of marital home enforceable by contempt, even though the decree expressly provided for alimony); *Zuccarello v. Zuccarello*, 429 So. 2d 68 (Fla. 3d Dist. Ct. App. 1983) (payments of \$20,000 lump sum alimony in 120 installments of \$222 is support, even though agreement

distribution principles in Florida,<sup>25</sup> an argument can be made that all property arrangements ought to be considered supportive in nature,<sup>26</sup> since property determinations during a dissolution are no longer independent of support obligations, but instead are part of an integrated whole.<sup>27</sup> Nevertheless, since the Florida courts have yet to make an unequivocal pronouncement on this issue, and also because the distinction between property and support is important in other areas,<sup>28</sup> any changes to article I, section 11 should be limited to support obligations only.

## B. Tax Obligations

As with alimony and child support orders, Florida courts have long held that imprisonment for non-payment of taxes does not violate the

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waived alimony). *But see* *Viega v. State*, 561 So. 2d 1335 (Fla. 5th Dist. Ct. App. 1990) (contempt is not available to enforce payment of lump sum alimony if it is for the purpose of effectuating an equitable distribution of marital assets).

25. FLA. STAT. § 61.075 (1991); *Robertson v. Robertson*, 593 So. 2d 491 (Fla. 1991) (starting point of equitable distribution is an equal division of marital assets.); *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (use of lump sum alimony to allow equitable distribution); *Duncan v. Duncan*, 379 So. 2d 949 (Fla. 1980) (companion case to *Canakaris*).

26. In fact, the suggestion that property settlement provisions be enforceable by contempt has been made at least twice. *See Marks v. Marks*, 457 So. 2d 1137, 1138 (Fla. 1st Dist. Ct. App. 1984) (Joanos, J., concurring); *Schminkey v. Schminkey*, 400 So. 2d 121 (Fla. 4th Dist. Ct. App. 1981) (follows general rule regarding property provisions, but certifies the question).

27. *Canakaris*, 382 So. 2d at 1197. In *Canakaris*, the Florida Supreme Court emphasized its intent that the overall result of the dissolution process be equitable, and that courts not be hampered in achieving that result by inflexible rules.

The Judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme.

*Id.* at 1202. The intent of *Canakaris* was carried into the statutory scheme, wherein one of the factors which a trial court must consider in awarding alimony is "the financial resources of each party, the non-marital and marital assets distributed to each [party]." FLA. STAT. § 61.08(2)(d) (1991).

28. *See, e.g.*, 11 U.S.C. § 523(a)(5) (1993) (support obligations not dischargeable in bankruptcy); 26 U.S.C. §§ 71, 215 (1988) (alimony considered income to supported party, and is deductible to paying party).

prohibition on imprisonment for debt.<sup>29</sup> The rationale used to justify imprisonment for non-payment of taxes is similar to that used in domestic support cases.

The act of paying a constitutionally levied tax is nothing more (nor less) than a bearing of the taxpayer's share of the necessary expenses of government. It is a *contribution* toward the governmental machinery of our democratic way of life and is essential to its preservation. Such payment or contribution does not amount to the satisfaction of a civil debt in the legal significance of that term. It is more in the nature of a privilege, or the fulfillment of a moral obligation, of citizenship. Such privilege, or obligation, if not voluntarily enjoyed or discharged, may be enforced by the will of the majority through the exercise of inherent sovereign power.<sup>30</sup>

Although the exception for tax obligations is clear, what constitutes a tax obligation may not be. At least one Florida court has distinguished between a tax and a service fee, holding that the latter is not subject to enforcement by imprisonment.<sup>31</sup>

### C. Recommendation

The Florida courts have clearly carved out exceptions to the constitutional prohibition on imprisonment for debt contained in article I, section 11 in cases involving payment of domestic support obligations<sup>32</sup> and payment of tax obligations.<sup>33</sup> In each case, the courts justified the exception by distinguishing the obligation owed from a "debt" as contemplated by section 11.<sup>34</sup> A more modern approach to the problem might be to justify the exceptions on the basis of a compelling governmental interest in the payment of domestic support or payment of taxes.<sup>35</sup> However, regardless

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29. *Gaulden v. Kirk*, 47 So. 2d 567 (Fla. 1950) (broad-based constitutional challenge to the state sales tax).

30. *Id.* at 579 (emphasis added).

31. *Turner v. State ex rel. Gruver*, 168 So. 2d 192 (Fla. 3d Dist. Ct. App. 1964) (imprisonment for failure to pay county garbage collection fees violates constitutional prohibition on imprisonment for debt because fee is in the nature of a contractual obligation due for services rendered).

32. See *supra* notes 12-28 and accompanying text.

33. See *supra* notes 29-31 and accompanying text.

34. See *supra* text accompanying notes 15 and 30.

35. All rights enumerated in the Declaration of Rights, article I of the Florida Constitution, are considered to be fundamental. Hillsborough County Governmental

of the justification, the exceptions have been created and should be accounted for in the express language of the constitutional provision. Therefore, article I, section 11 should be formally amended to expressly allow imprisonment for failing to pay domestic support obligations and tax obligations.<sup>36</sup>

### III. ARTICLE III, SECTION 8(A): A SUGGESTED CHANGE REGARDING THE GOVERNOR'S VETO POWER

Under the 1968 Florida Constitution, the Governor has seven days in which to veto a bill following its presentment to him by the Legislature.<sup>37</sup> In the absence of an express veto, a bill without the Governor's signature becomes law seven days after presentment.<sup>38</sup> The only express exceptions to the seven day time frame are when the Legislature adjourns sine die, or takes a recess of greater than thirty days, within the seven day period following presentment.<sup>39</sup> In such a situation, the Governor is allowed an additional eight days to veto the bill.<sup>40</sup> If the Governor fails to sign or

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*Employees Ass'n v. Hillsborough County Aviation Auth.*, 522 So. 2d 358, 362 (Fla. 1988). Thus, any government action which runs counter to the prohibition on imprisonment for debt must be justified by a compelling governmental interest, and must achieve its means through the use of the least intrusive means. See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985).

36. As revised, article I, section 11 would read: "No person shall be imprisoned for debt, except in cases of involving fraud, domestic support or taxes."

37. Article III, section 8(a) states:

Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill.

FLA. CONST. art. III, § 8(a). The purpose for allowing the Governor time to deliberate is to "safeguard the executive's opportunity to consider all bills presented to him." *Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n*, 489 So. 2d 1118, 1119-20, (Fla. 1986) (citing *Edwards v. United States*, 286 U.S. 482, 486 (1932)).

38. FLA. CONST. art. III, § 8(a).

39. *Id.*

40. *Id.* The additional time granted affords the Governor the opportunity to sufficiently handle the annual flood of bills passed in the waning hours of a legislative session. *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1120.



veto the bill during the additional time allotted, the bill becomes law.<sup>41</sup>

Article III, section 8(a), does not give the Governor additional time to sign bills which are presented *after* adjournment,<sup>42</sup> even though a significant number of the bills passed at the end of the legislative session are presented to the Governor after adjournment.<sup>43</sup> In spite of this express constitutional language, Governors used the expanded time period in such situations without challenge until 1983.<sup>44</sup>

In May of 1983, the Legislature passed Senate Bill 168, which, *inter alia*, allowed board certified optometrists to administer and prescribe certain prescription drugs.<sup>45</sup> The bill was presented to the Governor on June 14, one day after the Legislature had adjourned *sine die*, and the Governor vetoed the bill fifteen days later, on June 29.<sup>46</sup> The Florida Optometric Association filed a petition for a writ of mandamus to require the publishing of Senate Bill 168 as a law, based on its contention that the Governor's authority to veto the bill under the express language of article III, section 8(a) expired on June 21, seven days after presentment.<sup>47</sup> The circuit court dismissed the petition with prejudice, construing article III, section 8(a) as providing the Governor with the extended fifteen day time period to veto bills presented after adjournment.<sup>48</sup> The district court, basing its decision upon the express language of article III, section 8(a), reversed the trial court and ordered the Secretary of State to publish Senate Bill 168 as a law.<sup>49</sup> However, recognizing the potential impact of the decision on the legislative

41. Compare U.S. CONST. art. I, § 7, cl. 2, which provides the President the power to veto a bill by not signing it if the Congress, by adjourning, has prevented the president from returning the bill to the Congress. The Florida Constitution affords the Governor no such "pocket veto" power.

42. FLA. CONST. art. III, § 8(a). The only exception to the seven day period is for bills which are pending before the Governor when the Legislature adjourns or takes a recess.

43. See *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1120 ("It is evident from the record that in a typical session of the Florida Legislature some 60 percent of all bills passed during the session are presented to the Governor just before or immediately after adjournment, with the bulk submitted after adjournment.").

44. In fact, in at least one instance, the Florida Supreme Court tacitly approved the Governor's use of the extended time period where the Legislature adjourned prior to presentment. See *In re Advisory Opinion to the Governor*, 374 So. 2d 959, 963 (Fla. 1979).

45. *Florida Optometric Ass'n v. Firestone*, 465 So. 2d 1319, 1320 n.1 (Fla. 1st Dist. Ct. App. 1985), *rev'd sub nom. Florida Soc'y of Ophthalmology*, 489 So. 2d at 1118.

46. *Florida Optometric Ass'n*, 465 So. 2d at 1320.

47. *Id.*

48. *Id.*

49. One judge dissented and would have upheld the trial court's decision. *Id.* at 1323 (Zehmer, J., dissenting).

and executive branches, the district court certified the question to the Florida Supreme Court,<sup>50</sup> which accepted jurisdiction and reversed.<sup>51</sup>

Although faced with plain and unambiguous language requiring application of a seven day period, Justice Barkett, writing for the majority, nevertheless construed article III, section 8(a), so as to allow the Governor fifteen days to veto bills presented after adjournment.<sup>52</sup> While the suitability of constitutional construction as a means of reaching this result is open to debate,<sup>53</sup> it is clear that the result reached was appropriate,<sup>54</sup> given the volume of last minute bills presented to the Governor.<sup>55</sup> Therefore, the next Revision Commission should consider amending article III, section 8(a) to expressly allow the Governor fifteen days to veto bills presented after the Legislature adjourns sine die or after it takes a recess of more than thirty days.<sup>56</sup>

50. *Id.* The question certified was: "Whether Article III, Section 8(a), Florida Constitution, allows the Governor seven or fifteen consecutive days to act on a bill presented to him after the Legislature adjourns sine die, and, if he is allowed only seven days thereafter, should the effect of an opinion so holding have only prospective application?" *Id.* Clearly, even though not comfortable with the potential difficulties its decision would engender, the majority of the district court panel nevertheless felt compelled to uphold the language of article III, section 8(a).

51. *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1120.

52. *Id.* Rather than viewing article III, section 8(a), as an explicit rule with an explicit exception, Justice Barkett's analysis viewed the provision as one which merely failed to account for a particular circumstance, thus removing it from the plain language rule of construction. This having been accomplished, Justice Barkett then relied upon the underlying purpose of the extended veto period, and upon the long-standing construction given article III, section 8(a) by the Executive branch, to justify reading an expanded veto period into article III, section 8(a) in those situations when the Legislature presents a bill to the Governor after adjournment.

53. Justice Boyd, dissenting from the majority opinion in *Florida Soc'y of Ophthalmology*, held to the view that the language of article III, section 8(a) was precise, certain, and unambiguous, and therefore not amenable to judicial interpretation. *Florida Soc'y of Ophthalmology*, 489 So. 2d at 1124 (Boyd, J., dissenting).

54. Even Justice Boyd agreed that the result reached by the majority in *Florida Soc'y of Ophthalmology* was "reasonable and logical." *Id.* at 1124.

55. See *infra* note 43 and accompanying text.

56. As revised, article I, section 8(a) would read:

Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, or if the bill is presented to the governor after the legislature adjourns sine die or during a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill.

#### IV. ARTICLE V, SECTION 3(B)(3): THE CONTINUING PROBLEM OF THE CITATION P.C.A.<sup>57</sup>

The problem of the citation P.C.A. began in 1956 with the creation of the district courts of appeal by constitutional amendment. These courts were intended to be "error correcting courts," while the basic role of the supreme court was changed to that of a "law declaring court."<sup>58</sup> The district courts of appeal were, except for the specific instances of supreme court jurisdiction set out in the constitution, to be the appellate courts of last resort.<sup>59</sup>

Because the district courts of appeal were not required by the constitution to write an opinion explaining why they had affirmed judgments of the circuit courts<sup>60</sup> and because the supreme court was a "law making

57. The phrase "citation P.C.A." means a decision of a district court of appeal that in its entirety states, "*per curiam, affirmed*" and then references one or more cases.

58. See *State v. Grawien*, 362 N.W.2d 428 (Wis. 1985) where these terms are used. See also the following from *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) as quoted in *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

The new [article V] embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice . . . .

*Jenkins*, 385 So. 2d at 1357-58.

59. In *Ansin*, again as quoted in *Jenkins*, this jurisdiction was described as "review by the district courts in most instances being final and absolute." 101 So. 2d at 810. The reader should, of course, recognize that, in most instances, the circuit courts exercise appellate jurisdiction over judgments of county courts. See FLA. STAT. § 26.012 (1) (1992).

60. Although the author has been able to discover no supreme court rule covering the matter, the court has from time to time taken the position that it has authority to require, or at least request, a district court of appeal to write an opinion in a case it had earlier affirmed without one. See, e.g., *Hoisington v. Kulchin*, 172 So. 2d 586 (Fla. 1965). The district court of appeal had issued a *per curiam* affirmance "on the authority of" a series of earlier cases. The supreme court, having waded through the "record proper" under the *Foley* doctrine, was still unsure of its jurisdiction based on direct conflict of decisions. *Foley v. Weaver Drugs*, 177 So. 2d 211 (Fla. 1965). It therefore decided that its "final decision in this cause would be greatly facilitated by an expression of the district court of appeal upon the theory and reasoning upon which its judgment is bottomed and a request by this court is not unreasonable or improper." *Hoisington*, 172 So. 2d at 588 (citation omitted).

The supreme court went on to state: "request is respectfully made to the [district court of appeal] that it reconsider the cause and render an opinion setting forth the basis and reasoning upon which its decision in the cause is reached . . . ." *Id.* (Emphasis added).

Interestingly enough, the district court "respectfully declined at this late date, to reconsider the cause and set forth the basis and reasoning for [their] decision," and then proceeded to tell the supreme court what it apparently wanted to know. *Hoisington v. Kulchin*, 178 So. 2d 349, 351-52 (Fla. 3d Dist. Ct. App. 1965).

court,”<sup>61</sup> the issue of what purpose could be served by supreme court review of a simple “per curiam affirmed” decision, not accompanied by an explanatory opinion was bound to arise. Put somewhat differently, what “law” would be made by the supreme court’s review, pursuant to conflict jurisdiction, of a decision with no language?<sup>62</sup> Such decisions have no precedential value in the law of Florida, except perhaps for the circuit judge whose judgment had been affirmed and the lawyers in the case. Even then, these participants to the proceedings in the trial court might not know on what basis the affirmance had come about.<sup>63</sup>

As was suggested above, the issue arose in the context of the supreme court’s conflict jurisdiction.<sup>64</sup> Although the supreme court in that case, *Lake v. Lake*,<sup>65</sup> purported to find that, as a “law making court,”<sup>66</sup> it had no business looking for conflict in a case where the district court wrote no opinion, it, most unwisely as it turned out, “left room for the camel to get its nose into the tent.”<sup>67</sup>

There may be exceptions to the rule that this court will not go behind

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See also *infra* text following note 131 for further discussion of the supreme court’s power to request or require that a district court write an opinion when it has not chosen to do so.

61. See *supra* note 58.

62. From its inception in 1956, the supreme court’s discretionary review jurisdiction, which is where “conflict” is located, was “by certiorari.” With the 1980 amendment, the words “by certiorari” have been dropped. One now merely petitions for review. See FLA. R. APP. P. 9.120 and 9.900.

63. See *infra* text accompanying notes 80-83. At times, a district court of appeal may attempt to enlighten the circuit judge and the lawyers involved as to the basis of their affirmance by citing one to perhaps two or three cases from which the basis for their decision can perhaps be gleaned. See *infra* text accompanying note 96 for a discussion of these “counsel advising” citations to authority.

64. Since the creation of the district courts of appeal in 1956, one of the bases of the supreme court’s “law making” function was to resolve conflicts, or at least important conflicts, in the law enunciated by different district courts of appeal or between a district court of appeal and the supreme court. Between 1972 and 1980 the supreme court had jurisdiction to review intradistrict conflict, *i.e.*, conflict between panels of the same district court. Since 1980, intradistrict conflict is a basis for an en banc review by a district court of appeal. See *Chase Fed. Sav. & Loan Ass’n v. Schreiber*, 479 So. 2d 90 (Fla. 1985); see also FLA. R. APP. P. 9.331.

65. 103 So. 2d 639 (Fla. 1958).

66. See *supra* note 58.

67. It is an Arabic proverb that “[i]f the camel once get [sic] his nose in the tent, his body will soon follow.” TRIPP, THE INTERNATIONAL THESAURUS OF QUOTATIONS 114 (1970).

a [decision] per curiam, consisting only of the word 'affirmed' which [therefore] does not reflect a decision that would interfere with settled principles of law rendered by a district court of appeal. . . . Conceivably [however] it could appear from the restricted examination required in proceedings in certiorari that a conflict had arisen with resulting injustice to the immediate litigant. In that event the exception, not the rule, would apply.<sup>68</sup>

This statement clearly appears to ignore the conceded role of the supreme court, subsequent to the creation of the district courts of appeal, as a "law making" court.<sup>69</sup> Justice Thomas, the author of the *Lake* opinion, apparently realizing the opening the above statement created, attempted damage control of sorts.

But if the supreme court undertakes to go behind a [decision] on the tenuous theory that it must see that justice is done instead of giving to the judgment the verity it deserves and assuming that justice *has been done* the system that has been overwhelmingly approved by the people will be undermined and weakened.<sup>70</sup>

The attempted damage control did not work, not in the least because the language "assuming that justice *has been done*,"<sup>71</sup> is diametrically opposed to the role of the district courts of appeal as "error correcting" courts.<sup>72</sup> Within seven years, not just the camel's nose, but the entire camel was in the tent.<sup>73</sup>

Upon reconsideration of this entire matter, we have concluded that our appellate court decisions may be kept truly harmonious and uniform only by giving to the per curiam decisions without opinion of such courts the same 'verity' that we give to their decisions supported by an opinion. By subjecting such per curiam decisions to the same scrutiny on the 'record proper'—that is the written record of the proceedings in the court under review except the report of the testimony—as we give to the opinion upon which a district court of appeal decision is based, it may be concluded that a direct conflict exists which may forthwith be resolved by this court; or such scrutiny may show "the probable

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68. *Lake*, 103 So. 2d at 643.

69. *See supra* note 58.

70. *Lake*, 103 So. 2d at 643 (emphasis added).

71. *Id.*

72. *See supra* note 58.

73. *See supra* note 67.

existence of a direct conflict between the two decisions” which can definitely be determined only by remanding the cause to the appellate court with the request that a supporting opinion be written. [74] This is what we have, in fact, been doing heretofore. And we think the jurisprudence of this state will be best served by modifying the policy as to per curiam decisions [without opinion] announced in *Lake v. Lake*. . . . We hereby do so, and we hold that this court may review by conflict certiorari,[75] a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such a per curiam affirmance is to create conflict with a decision of this court or another district court of appeal.<sup>76</sup>

It is appalling that the supreme court failed to understand that its *Foley* decision had distorted its role as a “law making” court<sup>77</sup> and had in fact allowed it to assume the role of an “error correcting” court.<sup>78</sup> Remember the words in *Lake* about “injustice to individual litigants” caused by a *per curiam* affirmance without an opinion.<sup>79</sup> To the extent that the supreme court assumed this role that it was not intended to play, it diluted that very error correcting role which the 1956 Amendment to article V intended for the newly created district courts of appeal. This is illustrated by Justice Drew’s total misunderstanding of the precedential value of the words “*per curiam*, affirmed” when there is no district court opinion to give the court’s reason for the affirmance.

We must assume, in the absence of something in the record to indicate a contrary view, that an affirmance of a *decision* of a trial court by a decision of the District Court of Appeal makes the trial court decision the decision of the district court. So far as the trial judge is concerned and so far as the Bench and Bar who are familiar with the decision of the trial judge are concerned, such a judgment is the law of that jurisdiction.<sup>80</sup>

To this misunderstanding, Justice Thornal in his dissent in *Foley*, gave an irrefutable rebuttal. “How can one word ‘affirmed’ be a decision on the

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74. See *supra* note 60.

75. See *supra* note 62.

76. *Foley*, 177 So. 2d at 225.

77. See *supra* note 58.

78. *Id.*

79. See *supra* note 68 and accompanying text.

80. *Foley*, 177 So. 2d at 230 (Drew, J., concurring specially.). See *supra* text accompanying note 63.

same 'point of law' in conflict with some other decision? If it can be, what 'point of law' does the one word 'affirmed' decide?"<sup>81</sup> An even more devastating critique of Justice Drew's concurrence has subsequently been written.<sup>82</sup>

It [referring to the *Foley* majority, but more directly to Justice Drew's concurring opinion] is based on the indefensible assumption that trial judges assume that district courts issue per curiam affirmances [without opinion] only when they agree with the trial judge's reasons for ruling a certain way. That assumption is not only fallacious as a matter of simple logic, but it has, since *Foley*, been expressly rejected by the district courts themselves. Both the Second and Third District Courts of Appeal have expressly stated that trial judges can make no assumptions as to the basis on which a per curiam affirmation without opinion is rendered.<sup>83</sup>

Even if there were a scintilla of accuracy to the view that a per curiam affirmation of a trial court judgment unaccompanied by an opinion would or could create conflict of a precedential nature,<sup>84</sup> the supreme court, by allowing itself to go behind the decision and into the "record proper," destroyed the finality with which most decisions of district courts of appeal were supposed to be vested.<sup>85</sup> As chronicled in *Jenkins v. State*,<sup>86</sup> opposi-

81. *Foley*, 177 So. 2d at 231 (Thornal, J., dissenting).

82. See *supra* text accompanying note 80.

83. Florida Greyhound Owners & Breeders Ass'n, v. West Flagler Assoc., 347 So. 2d 408, 410-11 (1977) (England, J., concurring) (citation omitted).

84. "To my mind, there is no possible way that a district court's affirmance without opinion can create decisional disharmony in the jurisprudence of this state sufficient to warrant our attention." *Id.* at 411 (England, J., concurring) (footnote omitted).

85. Justice Thornal, in his dissenting opinion in *Foley*, stated:

All of this simply means that the district court decisions are *no longer final* under any circumstances. It appears to the author that the majority view is an open invitation to every litigant who loses in the district court, to come up to the supreme court and be granted a second appeal—the very thing that many feared would happen—the very thing which we assured the people of this state would *not* happen when the judiciary article was amended in 1956.

.....

If I were a practicing lawyer in Florida, I would never again accept with finality a decision of a district court. Under the majority decision today, there is always the potential opportunity to obtain another examination of the record by the supreme court with the hope that it will in some way differ with the district court.

*Foley*, 177 So. 2d at 234 (Thornal, J., dissenting).

tion to the *Foley* rule began to grow as the membership of the supreme court changed. The overturning of *Foley* became one of the chief reasons for the 1980 Amendment to the judicial article of the Florida Constitution.<sup>87</sup> Specifically to deal with the juxtaposition of the supreme court's conflict jurisdiction<sup>88</sup> and per curiam affirmances of the trial court where the district court chooses not to write an opinion, the word "expressly" was added to the constitutional language so that conflict review of decisions of district courts of appeal could be had only if they "expressly and directly"<sup>89</sup> conflicted with the decision of another district court or the supreme court. The six justices<sup>90</sup> of the supreme court who joined in the *Jenkins* decision clearly envisioned no exceptions to the rule that the supreme court under the 1980 Amendment, could not review a *per curiam* affirmance if it was not accompanied by an opinion.

[O]pponents of the [1980] amendment broadcast from one end of this state to the other that access to the Supreme Court was being "cut off," and that the district courts of appeal would be the only and final courts of appeal in this state. With regard to review by conflict certiorari [sic.]<sup>91</sup> of per curiam decisions rendered without opinion, they were absolutely correct.<sup>92</sup>

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86. 385 So. 2d 1356, 1358 (Fla. 1980); see also Arthur J. England, Jr. et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980).

87. *Foley*, 385 So. 2d at 1358.

88. See *supra* note 64.

89. The requirement that decisions directly conflict is discussed in *Neilson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1969) and *Wale v. Barns*, 278 So 2d 601, 604 (Fla. 1973).

90. Only Justice Adkins dissented, 385 So. 2d at 1363-66 (Adkins, J., dissenting).

91. See *supra* note 62.

92. *Jenkins*, 385 So. 2d at 1359. The court further stated:

The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This court may only review a decision of a district court of appeal that *expressly* and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." The single word "affirmed" comports with none of these definitions.

*Id.* (citation omitted).

The supreme court went on to exclude from its constitutional powers of review those per curiam affirmances that did not have a majority opinion, but did contain concurring and/or dissenting opinions. "Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not



*Jenkins* did not consider the so called "Citation PCA," that is to say, a *per curiam* affirmance by a district court of appeal that, although not accompanied by an opinion, cites one or more cases. It has generally been thought, although the author knows of only anecdotal evidence of this, that the purpose of the district court in citing cases was to let the appellants know the basis for the decision against them.<sup>93</sup> The question of the citation P.C.A. arose in *Dodi Publishing Company v. Editorial America*.<sup>94</sup> The supreme court, with great emphasis<sup>95</sup> and apparently without exception, refused to accept the argument that if the cited case or cases conflicted with a decision of the supreme court or another district court of appeal, reviewable conflict was created.

We reject the assertion that we should reexamine a case cited in a *per curiam* decision to determine if the contents of that cited case now conflict with other appellate decisions. *The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority.*<sup>96</sup>

This rule was extended slightly in *Robels Del Mar, Inc. v. Town of Indian Shores*<sup>97</sup> to include the situation where the referenced case is "filed contemporaneously with the citation P.C.A."<sup>98</sup> In the *Robels Del Mar* situation, however, the case had not been reversed by, and was not pending review in, the supreme court.<sup>99</sup>

The drafters of the 1980 Amendment had apparently not considered the

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the decision of the district court of appeal." *Id.* Perhaps it was this rationale that sowed the seeds of *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

93. On rare occasions, district courts will *per curiam* reverse the decision of a trial court and cite one or more cases. It is the author's opinion that this practice should be stopped by a rule issued by the supreme court. If a trial court decision is to be reversed by a district court of appeal, the judge and the parties are owed the courtesy and utility of an opinion explaining the reversal.

94. 385 So. 2d 1369 (Fla. 1980).

95. Only Justice Adkins dissented, *id.* at 1369 (Adkins, J., dissenting).

96. *Dodi*, 385 So. 2d at 1369 (Emphasis added).

97. 385 So. 2d 1371 (Fla. 1980).

98. *Id.*

99. "[T]he cited . . . decision, which was filed the same day as the instant *per curiam* opinion, is a final decision of the district court." *Id.* (citing *Epifano v. Town of Indian River Shores*, 379 So. 2d 966 (Fla. 4th Dist. Ct. App. 1979)). In other words, it was not pending review in, nor had it been reversed by, the supreme court.

problem of what to do if a case cited in a per curiam affirmance was pending review in the supreme court or had been reversed by it. The opinion in *Robels Del Mar*,<sup>100</sup> it can be argued, hints at this problem when the court describes the cited case as a final decision of the district court. The opinion in *Dodi*<sup>101</sup> fails to mention the problem at all. However, should review by the supreme court of a citation P.C.A. be denied when the case upon which it is predicated<sup>102</sup> has been reversed by the supreme court or is pending review there with reversal as a possible outcome? To unthinkingly follow the *Jenkins - Dodi - Robels Del Mar* rule would be morally intolerable in the event of the ultimate reversal of a predicate case.

This issue arose in *Jollie v. State*.<sup>103</sup> Although the facts are somewhat unique and it was bitterly criticized by Justice Boyd<sup>104</sup> as being in violation of the clear import of the *Jenkins - Dodi - Robels Del Mar* rule, *Jollie* vividly illuminated the problem referred to above.

Very simply stated, the Fifth District Court of Appeal had before it four cases involving an identical issue, whether the supreme court's rule on requested jury instructions was mandatory.<sup>105</sup> It wrote an opinion in one of the cases affirming the trial court's ruling, because even though it found the supreme court rule regarding requested jury instructions was mandatory, the failure of the trial court to follow the rule was found to be harmless error.<sup>106</sup> It then issued per curiam affirmances in the other three cases, and tied them to the opinion case with a citation to that case.<sup>107</sup> Conflict review was sought by the appellant in the case in which the opinion was written.<sup>108</sup> Two of the three citation P.C.A.'s were able to seek conflict review before the effective date of the 1980 Amendment<sup>109</sup> to article V of the Florida Constitution which, of course, cut off review by the supreme

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100. *Id.* at 1371.

101. 385 So. 2d at 1361.

102. At this point in the discussion, P.C.A. citations that are merely cited for counsel advisory purposes are to be considered distinguishable. See *infra* text accompanying notes 124, 126-27.

103. 405 So. 2d 418 (Fla. 1981).

104. *Id.* at 421-25 (Boyd, J., dissenting).

105. The issue was whether the supreme court's rule on requested instructions was mandatory. *Id.* at 419.

106. *Id.* (discussing *Murray v. State*, 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980), *quashed by Murray v. State*, 403 So. 2d 417 (Fla. 1981)).

107. *Id.*

108. *Jollie*, 405 So. 2d at 419 (describing *Murray v. State*, 403 So. 2d 417 (Fla. 1981)).

109. *Id.*

court of per curiam affirmances in which no opinion was written.<sup>110</sup> Because of "delayed processing through the district court,"<sup>111</sup> the third citation P.C.A., *Jollie's*, did not reach the supreme court until after the effective date of the 1980 Amendment.<sup>112</sup> With that one exception, *Jollie's* situation was the same as the other two citation P.C.A.'s which had beat the deadline. For this reason, and because *Murray v. State*,<sup>113</sup> the case in which the opinion was written, was pending review in the supreme court and thus, might be, and indeed was, reversed, the supreme court simply created an exception to the clear meaning of the 1980 Amendment<sup>114</sup> and agreed to hear *Jollie's* petition for review.<sup>115</sup> Thus, there was presented the classic circumstance where hard cases can make bad law.<sup>116</sup> *Jollie's* three companion cases were reversed, but *Jollie's* case would have been allowed to stand unless the supreme court did something. But did this hard case really make bad law or did it call attention to a flaw in the operation of the 1980 Amendment?

The supreme court got around the rule by finessing it in an extralegal manner. The court applied an earlier rule<sup>117</sup> which should have been modified by the 1980 Amendment. The supreme court conveniently ignored this fact.

We thus conclude that a district court of appeal per curiam opinion

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110. FLA. CONST. art. V, § 3(b)(3).

111. *Jollie*, 405 So. 2d at 419.

112. *Id.*

113. 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980).

114. See the perfectly correct dissent of Justice Boyd. *Jollie*, 405 So. 2d at 421-25 (Boyd, J., dissenting.)

115. It is interesting to note that by the time the court got around to considering *Jollie's* problem, it had already reversed the Fifth District Court of Appeal's decision in *Murray* and the other two citation P.C.A.'s on the ground that, although the Fifth District was correct in holding the supreme court's rule regarding requested jury instructions was mandatory, it had erred in considering the trial court's refusal to give instructions harmless error. See *Id.* at 419.

116. *Northern Sec. Co., v. U.S.*, 193 U.S. 197, 364 (1904).

117. The *Jollie* court stated:

Prior to the 1980 Amendment, a PCA decision which referenced another district court decision that this Court had reversed or quashed, was prima facie grounds for conflict jurisdiction. This long-standing policy decision was in effect well before the "record proper" doctrine was conceived and adopted in *Foley*. . . . The reasoning behind that policy decision continues to have validity. Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it.

*Jollie*, 405 So. 2d at 420.

which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.<sup>118</sup>

The supreme court might have added "In this context, the 1980 Amendment to the Judicial Article does not apply." The court, however, clearly envisioned this exception in light of the *Jollie* problem alone.

The situation presented in this cause ordinarily applies only to a limited class of cases. The problem arises from the practical situation which faces all appellate courts at one time or another - that is, how to dispose conveniently of multiple cases involving a single legal issue without disparately affecting the various litigants. Traditional practice in dealing with a common legal issue in multiple cases, both in district courts and here, has been to author an opinion for one case and summarily reference that opinion on all the others. Being time - [sic] and laborsaving for a court, that practice should not be discouraged.<sup>119</sup>

The problem was, and still is, broader than the supreme court envisioned when it created the *Jollie* exception. First, a district court of appeal in affirming without opinion a judgment of a trial court need not be faced with the multiple case - single issue *Jollie* situation. It can simply decide that one of its own earlier decisions is controlling, or indeed, an earlier decision of another district court of appeal is persuasive and should be followed. An example of the first situation is *Hamman v. Worling*<sup>120</sup> where the Fifth District Court of Appeal issued a per curiam affirmance not accompanied by an opinion on the authority of one of its earlier decisions in which an opinion was written.<sup>121</sup>

An example of the second is *Stupak v. Winter Park Leasing, Inc.*<sup>122</sup> where the Fifth District Court of Appeal *affirmed without opinion*, "on the

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118. *Id.*

119. *Id.*

120. 525 So. 2d 933 (Fla. 5th Dist. Ct. App. 1988), *approved by* Hamman v. Worling, 549 So. 2d 188 (Fla. 1989).

121. McCullough v. Central Florida Y.M.C.A., 523 So. 2d 1208 (Fla. 5th Dist. Ct. App. 1988) *reviewed sub nom.* Shearer v. Central Florida YMCA, 546 So. 2d 1050 (Fla. 1989). *McCullough* was pending review in the supreme court and was ultimately approved. This lead to the approval of *Hamman*, the citation P.C.A. Hamman v. Worling, 549 So. 2d 188 (Fla. 1989).

122. 563 So. 2d 1102 (Fla. 5th Dist. Ct. App. 1990), *quashed by* Stupak v. Winter Park Leasing, Inc., 585 So. 2d 283 (Fla. 1991).

authority of *Kraemer v. General Motors Acceptance Corporation*,<sup>123</sup> a Second District Court of Appeal decision decided with a written opinion the year before. This evolution of cases obviously goes beyond the limited situation envisioned by the supreme court in *Jollie*. It also blurs the distinction between the "on the authority of" citation P.C.A. and the more common "counsel advising" citation P.C.A.<sup>124</sup>

Obviously, the more time that elapses after the opinion case cited by the P.C.A. is decided, the less likely it is that the opinion case will be pending review in the supreme court. It is also far more likely that if the case the district court of appeal wishes to cite has been reversed by the supreme court, the district court would be aware of that fact.

The second scenario is admittedly highly unlikely, but there is at least one example known to the author where the supreme court overruled one of its own prior decisions and, years later, relied on the overruled decision as controlling precedent.<sup>125</sup>

Given these possibilities together with the rigid "expressly" language<sup>126</sup> regarding conflict review, no matter how it arises, where a citation P.C.A., whether the "on the authority of" variety or the mere "counsel advising" variety<sup>127</sup> (assuming that a clear distinction can be drawn) cites a case that is pending review in or has been reversed by the supreme court, *that* citation P.C.A. should be reviewable. The same rule should obviously hold true in the much rarer situation where the cited case

123. *Id.* (discussing *Kraemer v. General Motors Acceptance Corp.*, 556 So. 2d 431 (Fla. 2d Dist. Ct. App. 1989). There is an interesting twist in this situation since the supreme court described *Kraemer* as being "subsequently accepted for review." *Stupak*, 585 So. 2d at 283. This could mean subsequent to the decision in *Kraemer* being made or subsequent to the Fifth District Court of Appeal's reliance on it in *Stupak*. The former seems more likely but this situation clearly suggests that the supreme court follow its own suggestion in *Jollie*; that the mandates in citation P.C.A.'s should be withheld until the cited case is either accepted for review by the supreme court and affirmed or reversed, or time has run out for seeking review in the cited case. *Jollie*, 405 So. 2d at 420.

124. *See supra* text accompanying note 93.

125. In *Cause v. Canal Authority*, 209 So. 2d 865 (Fla. 1968), the supreme court overruled, *State ex rel Watson v. Lee*, 8 So. 2d 19 (Fla. 1942), to the extent that it held that the supreme court's all writs power (currently article V, section 3(b)(7)) may not be invoked until the supreme court obtained jurisdiction over the case at issue on another basis. In *Shevin ex rel State v. Public Service Comm'n*, 333 So. 2d 9, 12 (Fla. 1976), *State ex rel Watson v. Lee* was cited as controlling authority for the very proposition that was overruled in *Canal Authority*.

126. *See supra* text accompanying note 92.

127. The distinction between the "on the authority of" P.C.A. and the "counsel advising" P.C.A. is not always clear.

is pending review in or has been reversed by the United States Supreme Court. That citation P.C.A. should also be made clearly reviewable by the supreme court.

Thus I suggest that the following italicized language be placed in article V, section 3(b)(3) of the Florida Constitution.

May review any decision of a district court of appeal that expressly . . . and directly conflicts with a decision of another district court of appeal, or of the Supreme Court of Florida *or of the Supreme Court of the United States* on the same question of law. *The supreme court may review district court of appeal decisions rendered without opinion when a case is cited as authority for the decision, or merely to advise counsel as to the basis for the decision, and that case is either pending review in the supreme court or has been reversed by the supreme court. The same rule will apply if the cited case is pending review in, or has been reversed by the Supreme Court of the United States.*<sup>128</sup>

A second aspect of the citation P.C.A. problem, which can only arise in a *Jollie* type context, deserves different treatment. This problem, and the supreme court's proposed solution, is succinctly set out in the *Jollie* opinion.<sup>129</sup>

We recognize that no litigant can guide the district court's selection of the lead case, and that the randomness of the district court's processing would control the party's right of review unless the citation PCA is itself made eligible for review by this Court.<sup>130</sup>

What the supreme court was apparently concerned about was the situation where the lead case, the one in which the opinion was written, was never taken to the supreme court. Thus, it would never be pending review or reversed by that court. Such a situation seems superficially unfair because the party may feel: "If only the district court had selected my case as the opinion case, I'd have sought review." The fact remains, however, that under the 1980 Amendment, the district court decision was supposed to become final. That was the point of the amendment. The district courts were intended to be the courts of last resort in most instances, and this

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128. Such an amendment would alleviate Justice Boyd's very valid complaint in his *Jollie* dissent; that the word "expressly" in article V, section 3(b)(3) meant exactly what it said. *Jollie*, 405 So. 2d at 421-25 (Boyd, J., dissenting).

129. 405 So. 2d 418 (Fla. 1981).

130. *Id.* at 421.

situation should be one of those instances. Under article V, the supreme court is given no opportunity to review such a case unless the aggrieved party seeks review. The supreme court should abandon what it describes as this "second aspect of the [Jollie] problem."<sup>131</sup> No change in constitutional language should be necessary to accomplish this.

Finally, to insure that the supreme court does not drift back to its old bad habits, I recommend that a section be added to article V of the Florida Constitution, that will prohibit the supreme court from asking or directing a district court of appeal to write an opinion in a case where it has not done so.

#### V. ARTICLE VII, SECTION 1(B): AD VALOREM TAXATION OF MOBILE HOMES

Florida has traditionally been a haven for mobile homes<sup>132</sup> which provide relatively inexpensive shelter<sup>133</sup> for many, and in particular, for Florida's large population of retirees.<sup>134</sup> A majority of mobile homes in

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131. *Id.*

132. As of 1990, occupied mobile homes accounted for 575,455, or 11.2% of the 5,134,869 occupied housing units in Florida. BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1992 FLORIDA STATISTICAL ABSTRACT, tbls. 2.06, 2.35 at 69, 88. By comparison, in 1987, mobile homes accounted for 5,267,000, or only 5.8% of the 90,888,000 occupied housing units nationally. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbl. 1230, at 721 (1992).

133. As of 1991, the median sales price of a mobile home in the United States was \$27,800, which represented a 162% increase over the 1975 average sales price of \$10,600. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbl. 1216, at 712 (1992). By comparison, over the same time period, the median sales price of a new single family home increased 184% from \$39,300 to \$120,000, and the median sales price of an existing single family home increased 205% from \$35,300 to \$100,300. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbls. 1215, 1217, at 712 (1992).

134. As of 1991, persons over the age of 65 made up 18.3% of Florida's population, as compared to a national figure of 12.6%. Compare BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1992 FLORIDA STATISTICAL ABSTRACT, tbl. 1.36, at 24 (1992) with BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, tbl. 12, at 14 (1992). One mobile home advocate estimates that as many as 75% of all retirees coming to Florida move into mobile homes. Steve Garbarino, *Mobile They Aren't, and with 20 Percent of Florida Residents Under Their Roofs They're Here to Stay*, ST. PETERSBURG (FLA.) TIMES, June 28, 1987, at 1H [hereinafter *Mobile They Aren't*].

the state are located in rental parks,<sup>135</sup> in which the owner of the mobile home rents space from the owner of the park. Although mobile homes in rental parks are subject to sales tax and an annual license tax, they are exempt from ad valorem taxation as personal or real property under current Florida law.<sup>136</sup> Mobile homes outside of rental parks do not benefit from the ad valorem tax exemption.<sup>137</sup>

This section of this article will trace the history of the mobile home exemption,<sup>138</sup> and describe some of the problems currently caused by it.<sup>139</sup> We will then look at justifications commonly advanced in support of the exemption,<sup>140</sup> and recommend a substantial revision to article VII, section 1(b) of the Florida Constitution.<sup>141</sup> Finally, we will briefly discuss the anticipated impact of the proposed revision.<sup>142</sup>

### A. *Historical Development of the Mobile Home Exemption*

Florida's organic law has always allowed the ad valorem taxation of

135. In 1990, there were 5388 rental parks for mobile homes in Florida, accounting for approximately 544,367 mobile homes, *Did You Know?*, ST. PETERSBURG (FLA.) TIMES, Mar. 21, 1993, *Hernando Times*, at 8, or 71.4% of the 762,855 mobile homes (occupied and unoccupied) in the state. BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1991 FLORIDA STATISTICAL ABSTRACT, tbl. 2.36, at 18 (1991) ("MH" registration stickers normally should be sold only to mobile homes located in rental parks).

136. FLA. CONST. of 1968, art. VII, § 1(b) ("Motor vehicles, boats, airplanes, trailers, trailer coaches and mobile homes, as defined by law, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes."); see FLA. STAT. ch. 212 (1991 & Supp. 1992) (tax on sales, use, and other transactions); FLA. STAT. ch. 320 (1991 & Supp. 1992) (motor vehicle licenses).

137. The mobile home exemption does not apply to mobile homes which are permanently affixed to land owned by the owner of the mobile home. FLA. STAT. §§ 193.075(1), 320.015(1) (1991). Ownership of the underlying land need not be legal ownership. See *Mikos v. King's Gate Club, Inc.*, 426 So. 2d 74, 76 (Fla. 2d Dist. Ct. App. 1983) (equitable ownership through share ownership in non-profit corporation which held legal title to the underlying land). Furthermore, a mobile home need only be tied down and connected to the "normal and usual" utilities to be considered permanently affixed. FLA. STAT. § 193.075(1) (1991) (minimum tie-down requirements are provided for in FLA. STAT. § 320.8325 (1991)). The only exception to the ownership rule is for mobile home dealers who use the mobile home for display purposes at their sales location. Ch. 93-132, § 6, 1993 Fla. Laws 761, 763 (amending FLA. STAT. § 193.075(1) (1991)).

138. See *infra* notes 143-65 and accompanying text.

139. See *infra* notes 166-88 and accompanying text.

140. See *infra* notes 189-203 and accompanying text.

141. See *infra* notes 204-14 and accompanying text.

142. See *infra* notes 215-32 and accompanying text.



real and tangible personal property.<sup>143</sup> Over the years, a number of exemptions to ad valorem taxation have been adopted,<sup>144</sup> and, in 1930, the voters of the state adopted an exemption for motor vehicles.<sup>145</sup> Over time, the motor vehicle exemption was expanded to cover other transportation-related property, such as airplanes,<sup>146</sup> boats,<sup>147</sup> and trailers.<sup>148</sup> In each case, it was the transportation-related purpose of the property which justified its classification as a "motor vehicle."<sup>149</sup> At the outer limit of the motor vehicle exemption was a legislatively granted exemption from ad valorem

143. Originally, the constitution provided no limitation on the types of taxation available to the Legislature for state purposes. FLA. CONST. of 1838, art. VIII, § 1; FLA. CONST. of 1861, art. VII, § 1; FLA. CONST. of 1865, art. VIII, § 1; FLA. CONST. of 1868, art. XII, § 2; FLA. CONST. of 1885, art. IX, § 2 (amended 1940). The early constitutions also required the Legislature to authorize local governments to levy for local purposes those types of taxes available to the state. FLA. CONST. of 1838, art. VIII, § 4; FLA. CONST. of 1861, art. VII, § 4; FLA. CONST. of 1865, art. VIII, § 4; FLA. CONST. of 1868, art. XII, § 6; FLA. CONST. of 1885 art. IX, § 5. In 1940, the Constitution of 1885 was amended to provide that "after December 31st A.D. 1940, no levy of ad valorem taxes upon real or personal property except intangible property, shall be made for any State purpose whatsoever." FLA. CONST. of 1885, art. IX, § 2 (1940). Thus, after 1940, local governments had the exclusive authority to levy taxes on real and tangible personal property. See FLA. CONST. art. VII, § 1(a) ("No state ad valorem taxes shall be levied upon real estate or tangible personal property.").

144. FLA. CONST. art. VII, § 6 (homestead exemption of \$25,000); FLA. CONST. art. VII, § 3(a) (exemption for those portions of property which are used "predominantly for educational, literary, scientific, religious or charitable purposes"); FLA. CONST. art. VII, § 3(b) (minimum exemption of \$1000 for "household goods and personal effects").

145. FLA. CONST. of 1885, art. IX, § 13 (1930, amended 1965, revised 1968). The purpose of the amendment was to prevent the "double taxation" of motor vehicles both as vehicles and as tangible personal property. See *McLin v. Florida Auto. Owner's Protective Ass'n*, 141 So. 147, 148 (1932) ("The amount of the 'license tag' tax . . . is not only collected as an excise tax on the privilege of using the roads, but as a property tax in substitution of the previously levied ad valorem taxes which were applicable to motor vehicles prior to the constitutional amendment.").

146. *L.B. Smith Aircraft Corp. v. Green*, 94 So. 2d 832 (Fla. 1957) (approving legislative classification of aircraft as motor vehicles).

147. 1962 FLA. ATT'Y GEN. ANN. REP. 97 (approving legislative classification of boats as motor vehicles).

148. *Wood v. Club Transp. Serv., Inc.*, 196 So. 843, 843 (1940). The case involved "aerocars," two wheeled semi-trailers which were used to transport baggage and passengers between hotels and passenger stations. The Florida Supreme Court held such trailers to be within the motor vehicle exemption because their function was to increase the capacity of a motor vehicle for carrying passengers and baggage. *Id.*

149. *Wood*, 196 So. at 843 ("It would not be logical to conclude that the people meant to relieve a car of ad valorem taxes but to leave subject to that burden a vehicle purely auxiliary to it and dependent upon it for useful operation."); see also *infra* notes 151-52 and accompanying text.

taxation for trailers used for housing accommodations.<sup>150</sup> However, in 1965, the Florida Supreme Court, relying upon the transportation-related purpose rationale of its previous decisions, held that the statutory exemption was unconstitutional to the extent that it applied to trailers which were not used primarily for transportation purposes.<sup>151</sup> Thus, trailers used primarily for housing purposes would be subject to ad valorem taxation as tangible personal property for the first time in eighteen years.<sup>152</sup> As a result, the mobile home lobby immediately went to work in Tallahassee.<sup>153</sup> Before

150. The law expressly limited its scope to "trailers and vehicles not self-propelled used for housing accommodations and known as trailer coaches." Ch. 23969, § 1, 1947 Fla. Laws 741, 741 (codified at FLA. STAT. § 320.081(1) (1949)). It provided for a \$10 annual license fee "in lieu of all other taxes". Ch. 23969, § 2, 1947 Fla. Laws 741, 741 (codified at FLA. STAT. § 320.081(2) (1949)). The fee was increased to \$15 in 1963. Ch. 63-528, § 2, 1963 Fla. Laws 1353, 1356 (codified at FLA. STAT. § 320.081 (1963)).

151. *Palethorpe v. Thomson*, 171 So. 2d 526 (Fla. 1965). In *Palethorpe*, the tax assessor of St. Johns county made personal property assessments for 1963 against trailers used exclusively for housing purposes, even though the owners had paid their annual license tag tax on the trailers. The trailer owners challenged the assessment as a violation of Florida Statutes section 320.081, which provided an exemption for trailers used as housing accommodations. *Id.* at 528. In response, the tax assessor argued that by specifically exempting trailers used for housing, the Legislature created a tax exemption not expressly allowed by the constitution. *Id.* at 529. The resolution of the issue thus turned upon whether trailers used primarily for housing purposes were "motor vehicles" as contemplated by the constitutional exemption. In relying upon the rationale of *Wood*, 196 So. at 843, and placing substantial weight upon the use to which the trailers were put, the supreme court held that they were not motor vehicles.

[A] trailer, . . . when it is drawn or is capable of being drawn by an automobile or other motor vehicle primarily to carry persons or property over the public highways should be classified as a motor vehicle, even though it is incidentally and occasionally used to house persons over night while in transit or to house them for short periods on holidays or vacations. But where to all intents and purposes the actual primary use of such a trailer bears no reasonable relation to customary motor travel or carriage and the trailer is found to be used over longer periods than those above stated, for housing accommodations or for other non-transportation purposes, the exemption does not apply. The reason being that under such circumstances a trailer loses its primary character as a unit of motor vehicle transport and serves, for example, as an apartment or residence, and is no longer within the exempt class.

*Palethorpe*, 171 So. 2d at 531.

152. *Id.* (Classification as tangible personal property was to be made "regardless of whether or not a Florida license tag is purchased for [the mobile home]. . . .").

153. For example, as a part of its campaign to reverse the *Palethorpe* decision, the Florida Mobile Home and Recreational Vehicle Association opened a private restaurant in Tallahassee, which served free liquor and meals to legislators and their guests. Martin Dyckman, *The "Good Old Days" Weren't*, ST. PETERSBURG (FLA.) TIMES, June 2, 1991, at

the end of the next session<sup>154</sup> the Legislature passed an emergency joint resolution to amend the constitutional motor vehicle exemption to specifically include mobile homes.<sup>155</sup> In a special off-year election the following November,<sup>156</sup> Florida voters approved the amendment by a narrow

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154. The Florida Supreme Court decided *Palethorpe* on January 26, 1965, and denied a motion for rehearing on March 5, 1965. *Palethorpe*, 171 So. 2d at 526. On May 3, 1965, Senator Ryan of Martin county introduced Senate Joint Resolution 751, a proposed amendment to the constitution which would overrule *Palethorpe* by expressly exempting mobile homes from ad valorem taxation. FLA. S. JOUR. 254 (Reg. Sess. 1965); see *infra* note 155. The resolution passed the Florida Senate on May 25, 1965, FLA. S. JOUR. 634 (Reg. Sess. 1965), and the Florida House of Representatives on May 31, 1965, FLA. H.R. JOUR. 1298 (Reg. Sess. 1965). The Governor approved the resolution on June 24, 1965. Fla. S.J.R. 751, at 1826 (1965).

155. As originally offered, Senate Joint Resolution 751 (SJR 751) proposed that the motor vehicle exemption be amended to include the following language:

"Motor vehicles" as that term is used herein also includes mobile homes, trailer coaches, house trailers, camper type mobile homes mounted and transported wholly upon the body of a self-propelled vehicle, or any type of trailer or vehicle body without independent motive power drawn by or carried upon a self-propelled vehicle designed for and used either as a means of transporting persons or property over the public streets and highways of this state or for furnishing housing accommodations, or both . . . .

FLA. S. JOUR. 634 (Reg. Sess. 1965). By erasing the distinction between transportation and housing uses of mobile homes, this language was obviously intended to undo the damage of the Florida Supreme Court's ruling in *Palethorpe*. The broad sweep of the original language was narrowed in committee by the appending of the following language to SJR 751:

provided, however, any included vehicle herein shall be subject to a license tax as an operable motor vehicle regardless of its actual use unless the included vehicle is permanently affixed to the land, in which case it shall be taxable as real property.

*Id.* This additional language seems to indicate a desire on the part of the Legislature to treat mobile homes as vehicles only until such time as they were no longer mobile, i.e. until a mobile home was "permanently affixed". However, this limitation on the exemption was revised significantly only seven years later. See *infra* note 163 and accompanying text. The Senate passed SJR 751 by a vote of 39-0, FLA. S. JOUR. 634 (Reg. Sess. 1965), and the House of Representatives by a vote of 100-3, FLA. H.R. JOUR. 1298 (Reg. Sess. 1965). In addition, both houses determined the existence of an emergency so as to allow a vote on the amendment at a special election on November 2, 1965. Fla. SJR 751, at 1826 (1965); see *infra* notes 156-57 and accompanying text.

156. The statewide ballot for the special election held on November 2, 1965, consisted only of five referendum questions. *Voters Face 5 Key Issues on Tuesday*, ST. PETERSBURG (FLA.) INDEPENDENT, Nov. 1, 1965, at 1 (other than the referendum on mobile home taxation, the questions involved a \$300 million highway bond issue, the creation of an additional district court of appeal, and creation of lower courts in Lake and Palm Beach counties).

margin.<sup>157</sup>

The lesson of 1965 was not lost on those legislators who helped to draft the 1968 revision to the Florida Constitution. Article VII, section 1(b), of the Florida Constitution continued the express mobile home exemption<sup>158</sup> but gave the Legislature the power to define "mobile home."<sup>159</sup> In addition, the 1968 Constitution failed to include a provision of the 1965 Amendment which classified as real property any mobile home which was permanently affixed to the ground.<sup>160</sup> This effectively granted the Legislature the power to determine when, and if, mobile homes would be considered real property for purposes of ad valorem taxation.<sup>161</sup> Clearly, the intent of the drafters in adopting article VII, section 1(b), in 1968 was to provide the Legislature with unfettered discretion in the granting and application of the constitutionally granted exemption for mobile homes.<sup>162</sup>

Since 1968, the Legislature has made almost constant adjustments to the statutory scheme which supports the mobile home exemption. On one hand, the Legislature expanded the scope of the exemption by requiring ownership of the ground upon which the mobile home is located before the mobile home can be taxed as real property.<sup>163</sup> This had the effect of precluding mobile homes located in rental parks from treatment as real

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157. The final margin of approval was 347,349 to 330,493, or 51.2% to 48.8%. Telephone Interview with Joel Mynard, Records Administrator, Division of Elections, Florida Secretary of State's Office (Aug. 26, 1993).

158. FLA. CONST. art. VII, § 1(b).

159. *Id.* The exemption applies to "mobile homes, as defined by law . . . ."

160. Compare FLA. CONST. of 1885, art. IX, § 13 (1965) with FLA. CONST. art. VII, § 1(b).

161. The real property provision contained in article IX, section 13 of the 1885 Constitution, as amended in 1965, became a part of Florida's statutory law with the adoption of the 1968 Constitution. FLA. CONST. art. XII, § 10; see FLA. STAT. § 320.015(1) (1969). Subsequently, the Legislature has amended section 320.015 several times. See *infra* note 163.

162. The nominal reason for the changes to the constitution was to provide the Legislature "flexibility" in determining the scope of the exemption. See Commentary to article XII, section 1 of the Florida Constitution of 1968, 26A FLA. STAT. ANN. 3 (West 1970). Florida courts have acknowledged the Legislature's plenary power in this regard. See *Nordbeck v. Wilkinson*, 529 So. 2d 360 (Fla. 2d Dist. Ct. App. 1988).

163. Originally, mobile homes were considered real property so long as they were permanently affixed to the ground, without regard to ownership of the underlying property. FLA. CONST. of 1885, art. IX, § 13 (1965); FLA. STAT. § 320.015 (1969). However, since such a definition would likely subject mobile homes in rental parks to ad valorem taxation, see 1971 FLA. ATT'Y GEN. ANN. REP. 304 (owner of mobile home need not own underlying property for mobile home to be considered a fixture and subject to ad valorem taxation), the Legislature added the ownership requirement in 1972. Ch. 72-339, § 2, 1972 Fla. Laws 1225, 1226 (codified as FLA. STAT. § 320.01 (Supp. 1972)). See generally *supra* note 137.

property for purposes of ad valorem taxation. On the other hand, the Legislature also narrowed the reach of the exemption by numerous revisions of the statutory definition of "mobile home."<sup>164</sup> As a result, the mobile

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164. Originally, the constitutional definition of mobile home, *see supra* note 155, was included within the statutory definition of "motor vehicle". FLA. STAT. § 320.01(1) (1965). Interestingly, Session Law chapter 65-446, which made this change, was adopted by the Legislature prior to its approval of the constitutional amendment. Ch. 65-446, 1965 Fla. Laws 1573. Since then, the Legislature has made sometimes fine distinctions between types of mobile housing units, usually based upon the purpose for which the unit was designed.

The first of these changes occurred in 1970, with the division of motor vehicles into two distinct categories: those units "used as a means of transporting persons or property over the public streets and highways", and those "designed and equipped to provide living and sleeping facilities . . . and for operation over the streets and highways of the state . . ." Ch. 70-391, § 1, 1970 Fla. Laws 1209 (codified at FLA. STAT. § 320.01(1) (Supp. 1970)). The following year, the break between "motor vehicle" and "mobile home" was finalized when the latter was defined as follows:

"Mobile home" includes any type of trailer or vehicle body, regardless of any appurtenances, additions, or other modification thereto, without independent motive power, manufactured upon an integral chassis or undercarriage and designed either for travel over the highways or for housing accommodations or both.

Ch. 72-339, § 1, 1972 Fla. Laws 1225 (codified at FLA. STAT. § 320.01(1)(b) (Supp. 1972)).

The 1972 definition excluded a significant number of vehicle/housing accommodation combinations, which were instead defined as "recreational vehicle-type units" ("RV units"). These were treated strictly as motor vehicles and not as mobile homes. *Id.* Over the years, RV units have given the Legislature some difficulty because of the various kinds of such units, and because of their similarity to mobile homes. Since 1972, the Legislature has statutorily defined each of the following kinds of RV units: travel trailers, camping trailers, slide-in and chassis-mount truck campers, and motor homes, FLA. STAT. § 320.01(1)(b)1-4 (Supp. 1972); fifth wheel recreation trailers, FLA. STAT. § 320.01(1)(b)5 (1977); park trailers, FLA. STAT. § 320.01(1)(b)5 (Supp. 1984); van conversions, FLA. STAT. § 320.01(1)(b)5 (Supp. 1988); and private motor coaches, FLA. STAT. § 320.01(1)(b)5 (1989).

The next major change to the statutory definition of mobile home was made in 1978.

"Mobile home" means a structure, transportable in one or more sections, which is 8 body feet or more in width and which is built on an integral chassis, and designed to be used as a dwelling when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein.

Ch. 78-221, § 1, 1978 Fla. Laws 662 (codified at FLA. STAT. § 320.01(2) (Supp. 1978)).

The removal of the prior language regarding travel over the highways marked the abandonment by the Legislature of any pretense that a mobile home was anything more than "a structure . . . designed to be used as a dwelling." *Id.* In addition, the removal of the prior language including fixtures as a part of the mobile home provides a basis for the current practice of taxing such fixtures as carports and enclosed porches as tangible personal property. Interview with G. Prentice Dort, Director, Mobile Home Division, Pinellas County Property Appraiser's Office, Clearwater, Florida (June 2, 1993) [hereinafter Dort Interview].

home exemption now applies only to transportable residential structures on an integral chassis, and not to other types of structures or vehicles.<sup>165</sup> Requiring ownership of the underlying land, combined with the adjustments to the definition of mobile home, leaves little doubt that the ultimate intent of the Legislature since 1968 has been to limit the scope of the exemption to those existing mobile homes located in rental parks.

### B. *Problems Caused by the Exemption*<sup>166</sup>

The exemption from the ad valorem taxation enjoyed by mobile homes in rental parks has resulted in three major problems. First and foremost is the loss of revenue to local government inherent in the exemption itself.<sup>167</sup> Rather than taxing mobile homes in rental parks as tangible personal property,<sup>168</sup> local governments instead receive an annual license tax which is collected by the Division of Motor Vehicles.<sup>169</sup> Given the disparity

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Since 1978, the definition of mobile home has not changed, although the Legislature has twice amended the statute to clarify certain license tax issues. *See* ch. 83-318, § 1, 1983 Fla. Laws 1951, 1954 (codified at FLA. STAT. § 320.01(2) (1983)) (defining mobile home length for license tax purposes); ch 85-155, § 5, 1985 Fla. Laws 1072, 1074 (codified at FLA. STAT. § 320.01(2) (1985)) (providing a rebuttable presumption as to mobile home length where drawbar has been removed). In addition, in 1992, the Legislature created a sub-category of mobile homes called "manufactured homes", which are defined as "mobile home[s] fabricated on or after June 15, 1976, in an off-site manufacturing facility for installation or assembly at the building site, with each section bearing a seal certifying that it is built in compliance with the Federal Manufactured Home Construction and Safety Standard Act." Ch. 92-148, § 5, 1992 Fla. Laws 1380, 1383 (codified at FLA. STAT. § 320.01(2)(b) (Supp. 1992)).

165. FLA. CONST. art. VII, § 1(b); FLA. STAT. § 320.01(2)(a) (Supp. 1992).

166. The problems outlined in this subdivision are based upon interviews with Pinellas County officials, and thus reflect those areas of difficulty in that jurisdiction. However, since the mobile home taxation scheme is statewide in scope, the problems discussed are likely to be widespread, although there are sure to be some differences between counties.

167. This loss is mitigated to some extent by the taxation as tangible personal property of fixtures attached to the mobile home. *See supra* note 164.

168. Tangible personal property is normally taxed at a rate slightly lower than is real property. For example, in Pinellas County, tangible personal property is taxed on average at roughly 19 mills, whereas real property is taxed at closer to 21 mills. Telephone Interview with G. Prentice Dort, Director, Mobile Home Division, Pinellas County Property Appraiser's Office (Sept. 9, 1993) [hereinafter Dort Telephone Interview].

169. FLA. CONST. art. VII, § 1(b); FLA. STAT. § 320.015(1) (1991). An annual license tax is collected when the owner of the mobile home first registers the mobile home and each year when the registration is renewed. FLA. STAT. § 320.081 (1991). The amount of the tax depends upon the length of the mobile home. FLA. STAT. § 320.08(11) (1991) (\$20 for the first 35 feet, and \$5 for each additional 5 foot increment, with a maximum of \$80 for mobile

between the license and personal property taxes for most mobile homes,<sup>170</sup> it is obvious that the exemption costs local governments significant amounts of money each year.<sup>171</sup>

A second problem related to the exemption is the misallocation of revenue between state and local governments due to the current sales tax distribution scheme for mobile homes. All mobile homes are currently subject to both state<sup>172</sup> and county<sup>173</sup> sales taxes when purchased.<sup>174</sup> However, although sales tax proceeds are shared with local governments by the state,<sup>175</sup> the local government which receives such funds may not be

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homes 65 feet in length or longer). Since each integral section of a mobile home is considered separately for purposes of taxation, *see* FLA. STAT. § 320.01(2) (a) (Supp. 1992), the owner of a mobile home which consists of two sections (commonly referred to as a "double wide") would pay twice the amount specified by section 320.08(11). *See also infra* notes 177-81 and accompanying text.

170. For example, for a 60 foot long "double wide" mobile home located in Pinellas County with an appraised value of \$30,000, the annual tangible personal property tax would be approximately \$570. *See supra* note 168. By comparison, the annual license tax paid on the same mobile home would be only \$90. *See supra* note 169.

171. Since mobile homes are exempt from assessment, and not just taxation, *see* FLA. STAT. § 192.001(11)(d) (1991), there are no estimates of lost revenue available. However, the discrepancy between potential property tax revenue and current license tax revenues speaks for itself. *See supra* note 170.

172. *See generally* FLA. STAT. ch. 212 (1991 & Supp. 1992) (sales tax). All mobile home sales are subject to the state-wide sales tax of six percent on the sales price of the mobile homes. FLA. STAT. § 212.06(1)(a) (Supp. 1992).

173. Florida allows counties to levy discretionary local option sales taxes for a variety of purposes, with a rate which varies between one-half of one percent and one percent, depending upon the purpose. FLA. STAT. § 212.055 (Supp. 1992) (valid purposes include charter county transit systems, local government infrastructure, operating expenses of counties with populations less than 50,000, indigent health care and county public hospitals). However, only the first \$5000 of the sales price of the mobile home is subject to these local sales taxes. *See* FLA. STAT. § 212.054(2)(b) (1991).

174. Both state and local sales taxes are collected on sales of mobile homes between dealers and non-dealers as well as sales between non-dealers. *See* FLA. STAT. § 212.06(10) (Supp. 1992) (title certificates may not be issued without proof of payment of sales tax); FLA. ADMIN. CODE ANN. r. 12A-1.037(1)(a), (b)(3) (1993).

175. Funds collected from the statewide sales tax are distributed mostly to the General Revenue Fund and various state trust funds, but approximately nine and one-half percent of proceeds collected from within qualified counties are returned to those counties to be shared between the county and any municipalities therein. FLA. STAT. § 212.20(6)(g) (Supp. 1992); *see* FLA. STAT. §§ 218.60-218.65 (1991) (proceeds disbursed to counties which qualify for revenue sharing pursuant to FLA. STAT. §§ 218.20-218.26 (1991)). Funds collected by the state from discretionary local option sales taxes are disbursed back to the county in which they were collected, minus an administrative fee not to exceed three percent. FLA. STAT. § 212.054(4) (1991).

the jurisdiction in which the mobile home will ultimately be situated.<sup>176</sup> As a result, local governments with significant concentrations of mobile homes often do not receive their intended share of the revenue produced by sales taxes on mobile home sales.

A third problem caused by the mobile home exemption is misallocation of license tax revenues between local governments.<sup>177</sup> Proceeds from the license tax are divided evenly between local school boards and either county or municipal governments.<sup>178</sup> Allocation of such proceeds often depend upon where the mobile home was originally registered, however, and not where the mobile home is located.<sup>179</sup> As with the misallocation of sales tax revenues,<sup>180</sup> local governments often do not receive a share of license tax proceeds commensurate with the number of mobile homes within their jurisdiction.<sup>181</sup>

The final problem with the mobile home exemption is the administrative contortions required of local officials to properly locate, classify, and tax mobile homes. Because mobile homes evolved from travel trailers which were pulled behind automobiles,<sup>182</sup> the Division of Motor Vehicles ("DMV") has traditionally had jurisdiction over issues regarding mobile

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176. This is because the statewide sales tax funds are disbursed to the county in which the sales tax dealer, i.e., the mobile home dealer, is located. FLA. STAT. § 212.20(6)(g) (Supp. 1992). Furthermore, discretionary local option sales tax funds resulting from mobile home sales are disbursed to the county identified as the residence of the purchaser on the registration or title certificate. FLA. STAT. § 212.054(3)(a) (1991). Thus disbursement of both state and local sales tax revenues does not depend upon the ultimate location of the mobile home.

177. All mobile homes not categorized as real property are subject to an annual license tax. FLA. STAT. § 320.015(1) (1991).

178. FLA. STAT. § 320.081(5) (1991) ("one-half to the district school board and the remainder either to the board of county commissioners, for units which are located within the unincorporated areas of the county, or to any city within such county, for units which are located within its corporate limits"). The state retains \$1.50 of the license tax collected for each mobile home and places it in the General Revenue Fund. FLA. STAT. § 320.081(4) (1991).

179. The registration contains a "location code", which, once entered, is unlikely to be changed because DMV personnel are not trained to modify it. Dort Telephone Interview, *supra* note 168.

180. See *supra* notes 171-76 and accompanying text.

181. Pinellas County officials estimate an annual shortfall of 15-45% of expected disbursements from license taxes. Dort Interview, *supra* note 164.

182. See Wilma Norton, *Crude Trailer Evolves into Museum Piece*, ST. PETERSBURG (FLA.) TIMES, Sept. 5, 1989, Largo-Seminole Times, at 1 (describing a home-made travel trailer dating from the 1930's).



homes.<sup>183</sup> Unfortunately, although the DMV has jurisdiction over mobile homes, it has no vested interest in exercising that jurisdiction efficiently.<sup>184</sup> Several problems result. First, pinpointing the actual location of a newly purchased mobile home may be difficult because the address shown on the original registration is often not the actual location of the mobile home.<sup>185</sup> Second, determining whether a mobile home owner has failed to properly renew the mobile home's registration is hampered by the lack of formalized sharing of such data between the DMV and local property appraisers.<sup>186</sup> Finally, local officials end up bearing the burden of proper enforcement of the license tax laws because the DMV allocates only minimal resources to such enforcement.<sup>187</sup> In fact, only by forging relationships at the local level are local officials able to obtain needed data regarding mobile homes from the DMV.<sup>188</sup>

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183. See generally FLA. STAT. chs. 319-320 (1991 & Supp. 1992). The DMV's responsibilities include issuance of title certificates, see FLA. STAT. §§ 319.21-319.29 (1991), collection and disbursement of annual license taxes, see *supra* note 165, issuance of mobile home stickers, see FLA. STAT. § 320.0815(2) (1991) (mobile homes are issued stickers for placement in the window of the mobile home rather than license plates), enforcement of mobile home safety standards, see FLA. STAT. §§ 320.823-320.8325 (1991 & Supp. 1992), and regulation of mobile home manufacturers and dealers, see FLA. STAT. §§ 320.77, 320.8225 (1991).

184. The only benefit to the DMV for collecting the annual mobile home license tax is the indirect benefit derived from the \$1.50 allocation from each registration which goes to the General Revenue Fund. FLA. STAT. § 320.081 (1991); see *supra* note 178.

185. Interview with Robert J. Joplin, Property Appraiser, Mobile Home Division, Pinellas County Property Appraiser's Office, in Clearwater, Florida (July 19, 1993) [hereinafter Joplin Interview]. Locating mobile homes is made more difficult by the common practice of installing mobile homes without obtaining proper permits. *Id.*, see Bruce Vielmetti, *Illegally Set Up Mobile Homes May Cost County Millions*, ST. PETERSBURG (FLA.) TIMES, Nov. 29, 1987, Pasco Times, at 1.

186. Dort Interview, *supra* note 164.

187. For example, in 1988, the DMV had only one inspector allocated for collection of delinquent license taxes for the entire Tampa/St. Petersburg/Clearwater area. Amelia Davis, *City Seeking Late Fees for Mobile Homes*, ST. PETERSBURG (FLA.) TIMES, Sept. 2, 1988, Largo-Seminole Times, at 1. As a result, local officials are effectively required to conduct an annual park by park audit in order to ensure full compliance with the license tax laws. *Id.* (City of Largo); Amelia Davis, *Police to Cite Mobile Home Decal Violators*, ST. PETERSBURG (FLA.) TIMES, Apr. 18, 1991, City Times, at 1 (City of Largo); Amelia Davis, *Mobile Homes Targetted*, ST. PETERSBURG (FLA.) TIMES, Sept. 3, 1991, North Pinellas Times, at 1 (Pinellas County); Matthew Sauer, *Mobile Home Tag Money Rolls In*, ST. PETERSBURG (FLA.) TIMES, Aug. 12, 1992, Largo-Seminole Times, at 1 (Pinellas County).

188. Joplin Interview, *supra* note 185. For example, the Pinellas County Property Appraiser's Office is allowed limited access to the County Tax Collector's motor vehicle renewal system in order to allow verification of mobile home registrations. *Id.*

### C. Justifications for the Exemption

Over the years, a number of justifications for the continued existence of the mobile home exemption have been advanced. The original justification was that mobile homes were just that, mobile, and therefore more akin to motor vehicles than to structures.<sup>189</sup> However, the decision of the Florida Supreme Court in *Palethorpe v. Thomson*,<sup>190</sup> which distinguished between the transportation and housing uses of "house trailers,"<sup>191</sup> signalled the end of the mobility argument. Any such argument which survived *Palethorpe* has been further eroded by the treatment of some mobile homes as real property and thus not subject to the exemption.<sup>192</sup> Indeed, the idea that modern mobile homes are mobile has been abandoned by the Legislature<sup>193</sup> as well as by some of the most ardent advocates of the exemption.<sup>194</sup> By now it is beyond dispute that mobile homes are structures designed for human habitation, and not mere trailers for general use on the roadways of the state.

A second argument advanced in support of the mobile home exemption is that owners of mobile homes in rental parks are already fully taxed because they pay sales taxes, license taxes, and property taxes on fixtures and on the rented ground as a part of their rent.<sup>195</sup> However, the argu-

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189. The "mobility" of mobile homes was central to the argument of the mobile homes owners in *Palethorpe*.

It is clear in the case at bar, that the trailer coaches' design was such that they were intended to be used in conjunction with a self-propelled motor vehicle. If not, then what is the purpose of the wheels, axles, brakes, running lights, and trailer hitches, not to mention the fact that the width was confined to that legally permissible to operate over the highways of the state. Obviously if the [trailer owners] did not desire mobility as well as living accommodations, they could have purchased identical living quarters without the mobile apparatus at a much cheaper cost and probably in much better locations.

Appellee's Answer Brief at 11-12, *Palethorpe v. Thomson*, 171 So. 2d 526 (Fla. 1965) (No. 33474).

190. 171 So. 2d 526 (Fla. 1965)

191. See *supra* notes 151-152 and accompanying text.

192. See *supra* note 137.

193. FLA. STAT. § 320.01(2)(a) (Supp. 1992) (mobile home defined as "a structure . . . designed to be used as a dwelling . . ."). See generally *supra* note 164.

194. Fred Yountek, former president of the Federation of Mobile Home Owners of Florida, a mobile home owners' advocacy group, has estimated that 95% of the mobile homes in Florida are never moved. *Mobile They Aren't*, *supra* note 134.

195. Typical is the following reaction to a letter to the editor taking the position that mobile home owners do not pay their share of taxes:

I am sick and tired of being put down for living in a mobile home by

ment fails because the mobile home exemption allows owners of mobile homes in rental parks to avoid paying ad valorem taxes on the value of the structure in which they live. Instead, such mobile home owners pay an annual license tax, which, on average, is much lower than the property tax levy would be.<sup>196</sup> While the license tax has not been increased once since voters adopted the exemption in 1965,<sup>197</sup> the personal property levy has reflected the inflation of property values and increased cost of government generally since then. The fact is that of all types of housing structures, only mobile homes in rental parks are totally exempt from ad valorem taxation.<sup>198</sup> It cannot be said that such a discrepancy was intended by Florida voters.<sup>199</sup>

A third justification for the continued existence of the mobile home exemption is that it is analogous to the homestead exemption available for owners of real property in Florida.<sup>200</sup> However, such reasoning ignores

people who don't know what they are talking about. First of all, let me tell you the taxes we pay.

1. Sales tax when we purchase our mobile home.
2. License tag fees each year.
3. Intangible tax.
4. Real property tax.

The people who live in rental parks receive no tax exemptions. All in all, a mobile home in a rental park pays taxes comparable to a home valued at \$39,500.17. As I see it, we are paying more than our fair share of taxes. I hope this explains to the man from Hudson that we are not freeloaders. We pay our share and then some.

*Mobile Home Owners Pay Taxes*, ST. PETERSBURG (FLA.) TIMES, Jan. 6, 1988, Pasco Times, at 2.

196. See *supra* note 170.

197. Compare ch. 65-466, § 2, 1965 Fla. Laws 1574 with FLA. STAT. § 320.08(11) (1991).

198. All permanent housing structures, whether rented or owner occupied, are subject to ad valorem taxation as real property. FLA. CONST. of 1968, art. VII, § 9(b) (1976) (authorizing levy of ad valorem taxes on real property by local governments); FLA. STAT. § 192.001(12) (1991) (defining "real property" for purposes of ad valorem taxation as "land, buildings, fixtures, and all other improvements to land."). Furthermore, mobile homes permanently affixed to land owned by the owner of the mobile home are also subject to ad valorem taxation as real property. FLA. STAT. § 193.075(1) (1991).

199. In fact, at the time, the expectation was that the exemption would save the owner of a typical mobile home approximately \$36.25 per year in personal property taxes, compared to an estimated average license tax of \$25.00. *Trailer Tax Probably Valid for This Year*, ST. PETERSBURG (FLA.) TIMES, Nov. 4, 1965, at B1.

200. The 1968 Constitution, as amended, provides a \$25,000 exemption to every person who owns real estate and maintains thereon their permanent residence. FLA. CONST. art. VII, § 6 (1980).

the fact that the mobile home exemption applies to all mobile homes in rental parks, and not just those used as a permanent residence.<sup>201</sup> In addition, other types of renters do not enjoy any benefit from the homestead exemption, even where those renting are permanent residents of Florida.<sup>202</sup> Finally, the mobile home exemption extends to the entire value of the mobile home, and not just to the first \$25,000 of assessed value covered by the homestead exemption.<sup>203</sup> Thus, the mobile home exemption is not analogous to the homestead exemption, because it applies whether or not the mobile home owner is a permanent resident of Florida, and because it exempts the full value of mobile homes in rental parks.

#### D. *Recommendation*

By now it is apparent that the exemption from ad valorem taxation currently enjoyed by owners of mobile homes located in rental parks is not defensible on any rational ground outside of the obvious concern legislators have for well organized special interest groups.<sup>204</sup> The exemption costs local governments significant revenue each year,<sup>205</sup> and the current statutory scheme for the collection and disbursement of sales and license taxes on mobile homes leaves much to be desired.<sup>206</sup> In addition, administration of mobile home taxation is left mainly to the ingenuity of local officials who rely on mobile home taxation, but have no jurisdiction over it.<sup>207</sup> Therefore, we recommend that the Revision Commission amend article VII, section 1(b), to revoke the ad valorem tax exemption for mobile homes.<sup>208</sup> Furthermore, in order to maintain a consistent approach between taxation of mobile homes and other types of housing structures, we also recommend that the Revision Commission expressly exempt mobile

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201. Compare FLA. CONST. art. VII, § 1(b) and FLA. STAT. § 320.015(1) (1991) with FLA. CONST. art. VII, § 6(a).

202. The 1968 Constitution, as amended, allows the Legislature to provide by general law a homestead exemption for renters who are permanent residents of the state. FLA. CONST. art. VII, § 6(e) (1980). To date, the Legislature has made no such provision.

203. Compare FLA. CONST. art. VII, § 1(b) with FLA. CONST. art. VII, § 6(a) (1980).

204. See *supra* note 153; *infra* note 230.

205. See *supra* notes 167-71 and accompanying text.

206. See *supra* notes 172-81 and accompanying text.

207. See *supra* notes 182-188 and accompanying text.

208. As revised, article VII, section 1(b) would read: "Motor vehicles, boats, airplanes, trailers, and trailer coaches ~~and mobile homes, as defined by law~~, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes."

homes from sales taxation.<sup>209</sup>

As a result of this amendment, mobile homes would generally be subject only to ad valorem taxation,<sup>210</sup> either as tangible personal property or as real property, depending on the circumstances.<sup>211</sup> This reflects the undeniable fact that today's mobile homes are used for housing, not for transportation.<sup>212</sup> Such a shift in emphasis would be consistent with both the policy underlying the original motor vehicle exemption granted in 1930<sup>213</sup> and with the rationale of the *Palethorpe* decision.<sup>214</sup>

### E. *Anticipated Impact of Recommendation*

The proposed amendments would have a differing impact on each of the various groups which have an interest in mobile homes located in rental parks. First, county and municipal governments would clearly benefit both as to administration of mobile home taxation<sup>215</sup> and as to receipt of funds derived from such taxation.<sup>216</sup> On the other hand, the state government would lose its sales tax revenue,<sup>217</sup> but would likely be able to mitigate such losses by reducing expenditures required under the current system,

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209. The revision would read: "The Legislature shall impose no sales or use tax upon tangible personal property which is designed and used primarily for housing accommodations."

210. The proposed amendment should not preclude the levying of appropriate license taxes when a mobile home is transported on public street and highways.

211. Mobile homes located in rental parks should be treated as tangible personal property, since the mobile home owner does not own the land underlying the mobile home. However, if the mobile home is owned by the owner of the land, then it should continue to be taxed as real property. See FLA. STAT. § 193.075(1) (1991); Ch. 93-132, § 6, 1993 Fla. Laws 565 (exempting mobile homes used by mobile home dealers exclusively for display purposes).

212. See *supra* notes 189-94 and accompanying text. The change in the physical appearance of mobile homes over the years supports this contention. Older homes were truly "trailers", measuring roughly 10 x 60 feet. More typical today is a "double wide," measuring 24 x 50 feet. The newest mobile homes measure 28 x 56 feet, and even have pitched roofs, a far cry from their flat-topped trailer ancestors. Telephone Interview with Dort, *supra* note 168.

213. See *supra* note 145.

214. *Palethorpe v. Thomson*, 171 So. 2d 526 (Fla. 1965); See *supra* note 151.

215. See *supra* notes 182-88 and accompanying text.

216. See *supra* notes 167-81 and accompanying text.

217. See *supra* notes 174-75.

which would no longer be needed under the amendment.<sup>218</sup>

Mobile home dealers would be impacted positively, if at all, by the proposed amendment. They would no longer be required to collect sales taxes on mobile home sales,<sup>219</sup> nor, hopefully, would they be required to perform other mobile home related administrative functions.<sup>220</sup> Furthermore, so long as the dealer actually owns a particular mobile home for the purpose of selling it, the mobile home would not be subject to ad valorem taxation.<sup>221</sup>

Two other groups which would be impacted by enactment of the proposed amendment are lien holders and holders of security interests against mobile homes. The dual nature of mobile homes as both vehicles and fixtures under the current system often forces lien and interest holders to resort to duplicative filings of their interest in order to be fully protected.<sup>222</sup> Under the proposed amendment, the need for separate filing would no longer exist.<sup>223</sup> Thus, both lien holders and holders of security interests would only be required to record their interest once, providing a level of certainty to an area of the law which is currently quite confused.<sup>224</sup>

Clearly, the group which would be most heavily impacted by the proposed amendment are the current owners of mobile homes located in

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218. For example, expenditures related to mobile home registration and license tax collection and disbursement. *See* FLA. CONST. art. VII, § 1(b); FLA. STAT. § 320.01(2)(a) (Supp. 1992). In addition, since mobile homes are not mobile, the current treatment of mobile homes as motor vehicles regarding title certification should be removed. *See* FLA. STAT. § 319.21 (1991 & Supp. 1992).

219. *See* FLA. STAT. § 212.06 (Supp. 1992).

220. For example, handling title certification of new mobile homes. *See supra* note 218.

221. FLA. CONST. art. VII, § 4(b) ("Pursuant to general law tangible personal property held for sale as stock in trade . . . may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation."); FLA. STAT. § 196.185 (1989) (exempting inventory from ad valorem taxation).

222. Encumbrances and liens against mobile homes currently should be filed with both the Division of Motor Vehicles, *see* FLA. STAT. §§ 319.24-319.27 (1991) (title certificates), and the Florida Secretary of State, *see* FLA. STAT. § 679.301-679.318 (1991) (UCC financing statements).

223. *See supra* note 218.

224. *Compare* FLA. STAT. § 320.015(2) (1991) (providing that a mobile home remains personal property for purposes relating to a security interest so long as the interest was created while the mobile home was considered personal, and not real, property) *with* General Elec. Capital Corp. v. Sohn, 566 So. 2d 841 (Fla. 1st Dist. Ct. App. 1990) (tax deed forecloses security interest in mobile home permanently affixed to the land covered by the deed).

rental parks.<sup>225</sup> The extent of the impact would depend upon the value of the mobile home,<sup>226</sup> but on average, the amendment would result in significantly higher tax payments.<sup>227</sup> However, higher payments could have the positive benefit of accelerating the current trend toward conversion of rental mobile home parks to ownership parks.<sup>228</sup>

In conclusion, it is clear that revocation of the mobile home exemption provided by article VII, section 1(b), of the Florida Constitution would have a sweeping impact upon the way mobile homes are taxed in Florida. It is equally clear that the group with the greatest stake in the amendment are the current owners of mobile homes in rental parks, since they would be asked to shoulder a greater tax burden than they do today.<sup>229</sup> This higher tax burden would be the single greatest barrier to enactment of the amendment.<sup>230</sup> However, the increased burden of the amendment could be

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225. An argument can be made that the trade-off between sales taxes paid up-front and personal property taxes paid over time is essentially a wash. If this is the case, then future buyers of mobile homes to be located in rental parks will not be effected by the proposed amendment.

226. See *supra* note 168. For example, assuming a tangible personal property tax rate of 19 mills, older single-wide mobile homes assessed at less than \$3000 would likely break even or benefit from annual ad valorem tax payments of \$57.

227. See *supra* note 170.

228. Significant numbers of mobile home owners within rental parks are purchasing the rental parks and converting them into condominiums or cooperatives. See FLA. STAT. § 718 (1991 & Supp. 1992) (condominiums); FLA. STAT. § 719 (1991 & Supp. 1992) (cooperatives); Betty Jean Miller, *Home Sweet Home Mobile Home Park Is Theirs*, ST. PETERSBURG (FLA.) TIMES, Mar. 24, 1992, City Times, at 1. Some rental parks are also subdivided, and individual lots sold to the mobile home owner. Dort Interview, *supra* note 164. Ownership of the underlying land, regardless of form, allows the mobile home owners to exercise more control over the services provided in the park, and, more importantly, allows many owners to take advantage of the homestead exemption. See *supra* note 200. This, of course, raises the potential for lost revenue due to the homestead exemption. Dort Interview, *supra* note 164 (one conversion resulted in the exemption of 60% of assessed value). However, such is the nature of the homestead exemption generally, and as such is beyond the scope of this discussion.

229. See *supra* notes 225-27 and accompanying text.

230. Not only are mobile home manufacturers well represented in Tallahassee, but 240,000 mobile home owners are represented by the Federation of Mobile Home Owners of Florida (FMO). See *supra* note 153; see also *Federation Can Help Keep Owners Informed*, ST. PETERSBURG (FLA.) TIMES, Nov. 10, 1991, at 3H. The FMO is an aggressive advocate for mobile home owners generally, and for those in rental parks in particular. Kendra Brown, ST. PETERSBURG (FLA.) TIMES, Jan. 12, 1990 (as of the end of 1989, FMO was involved in 65 court cases, most involving rent increases). Its activities go beyond applying pressure on the Legislature, and have included opposing judges who rule against mobile home owners, Bruce Vielmetti, *Mobile-Home Owners Group Campaigns Against Judge*, ST. PETERSBURG

lessened either by some kind of phased tax credit scheme,<sup>231</sup> or by conversion of the mobile home from personal property to real property.<sup>232</sup> Regardless, we believe that our proposal is fair to all parties involved. We strongly urge the Revision Commission to seriously consider action in this area.

## VI. ARTICLE VII, SECTION 10C: CHANGES IN THE PLEDGING OF PUBLIC CREDIT

Article VII, section 10(c) of the Florida Constitution has been so thoroughly changed by judicial decision that it should be modified to reflect those changes. In order to understand the scope of the change, it is useful to look at the pertinent part of the forerunner provision in the 1885 Constitution.

The credit of the State shall not be pledged or loaned to any individual, company, corporation, or association. . . . The legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.<sup>233</sup>

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(FLA.) TIMES, Aug. 27, 1990, Brandon Times, at 1, and flooding the United States Department of Housing and Urban Development with letters opposing increased safety standards in the face of Hurricane Andrew, Laurie McGinley, *Storm Rages Over Mobile-Home Safety*, WALL ST. J., Aug. 23, 1993, at B1.

231. For example, by allowing a credit against ad valorem taxation for sales taxes previously paid by the mobile home owner, the impact of the amendment on current owners would be lessened. Of course, no such credit has ever been offered for owners of mobile homes who also own the underlying land, even though they also pay ad valorem taxes.

232. See *supra* note 228.

233. FLA. CONST. of 1868, art. IX, § 10 (1875) (quoting *State v. Jacksonville Port Auth.*, 204 So. 2d 881, 882 (Fla. 1967)). The rationale for this provision in the 1885 Constitution was found to be two-fold. First:

This section was first adopted in 1875 as an amendment to the Constitution of 1868. Its purpose was to stop the practice of public bodies becoming stockholders or bond holders and in other ways loaning their credit to and becoming interest[ed] in the organization and operation of railroads, banks and other commercial institutions. Many of these enterprises were poorly managed and failed, resulting in such government entities as were interested therein in becoming responsible for their debts and other obligations, which obligations fell ultimately on the taxpayers.

*Jacksonville Port Auth.*, 204 So. 2d at 882.



The modern view of the effect of this provision of the 1885 Constitution has been set out in *Linscott v. Orange County Industrial Development Authority*.<sup>234</sup>

The Constitution of 1885, article IX, section 10, prohibited government bodies from obtaining money for, or pledging the public credit to, any private entity. Under case law, revenue bonds payable solely from capital project revenues (non-recourse bonds) were held to be pledges of public credit and were prohibited unless it could be shown that the capital project served a predominately or paramount public purpose . . . . [For example in *State v. Town of North Miami*, the trial court ruled that the non-recourse bonds for the construction of a private plant were valid because they did not involve a pledge of the public credit. Implicit in our decision overruling the circuit court was a determination that the bonds involved either obtaining money for, or pledging the public credit to, a private entity.

*Town of North Miami*, and its progeny, began to have a significant effect on Florida's economic development in the 1960's because of a ruling by the Internal Revenue Service, later codified, which made the interest on industrial revenue bonds exempt from federal income tax. As a result of this ruling, Florida was placed at a competitive disadvantage with other states which could offer tax exempt, non-recourse revenue bonds to private entities for capital projects.<sup>235</sup>

As pointed out in *Linscott*,<sup>236</sup> the reaction of the drafters of article VII of the 1968 Florida Constitution to *North Miami* and *Jacksonville Port Authority* was to write exceptions to the rule carried over from the 1885 Constitution against pledging credit. The exceptions were directed at the

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Second, such government involvement with business and commerce was seen as an interference with the free enterprise system. "Perhaps the modern trend of government encroachment on the free enterprise system is the wise road to follow. So long however, as the Constitution reads as it does now, it seems clear that we have no choice in the matter." *Id.* at 883. "[I]n 1966 this state added 397 new plants and 156 major plant expansions yielding 33,223 new jobs. These facts establish that Florida has prospered and continues to grow and prosper under the free enterprise system. It confirms the wisdom of our forefathers nearly a hundred years ago in writing into the Constitution one provision which to this date remains unchanged." *Id.* at 886 (footnote omitted).

234. 443 So. 2d 97 (Fla. 1983).

235. *Id.* at 98-100 (citing *Jacksonville Port Auth.*, 204 So. 2d at 881 wherein non recourse bonds for a major port expansion were held invalid).

236. *Id.* at 97.

*North Miami and Jacksonville Port Authority* situations.<sup>237</sup>

The basic limitation remained in article VII, section 10:

Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership, or person . . . .<sup>238</sup>

The reader will note that the ban on “*obtaining money for*” a “corporation, association, partnership or person”<sup>239</sup> found in the 1885 Constitution has been deleted. More on this anon. As alluded to above,<sup>240</sup> the 1968 version contained an exception aimed directly at the *North Miami and Jacksonville Port Authority* problems:

But this [the ban on pledging public credit] shall not prohibit laws authorizing:

(c)[<sup>241</sup>] the issuance and sale by any county, municipality, special district or any other local governmental body of (1) revenue bonds to

237. The *Linscott* court stated:

Concurrently, in August 1967, each house [of the Florida legislature] adopted joint resolutions proposing revisions to the constitutional provisions prohibiting the pledge of the public credit to private entities. In pertinent part, the thrust of the Senate version was to overturn *Jacksonville Port Authority* [(disapproval of use of revenue bonds to improve port facilities for a private entity)]; that of the house version to overturn *Town of North Miami* [(disapproval of the use of revenue bonds to build a warehouse for the private sector)].

*Id.* at 100 (footnotes omitted).

As the reader can easily see, when approved by the electorate, these become the “airport and port facilities” and “industrial and manufacturing plant” exceptions in article VII, section 10(c) of the 1968 Florida Constitution.

238. FLA. CONST. art. VII, § 10.

239. *See supra* text accompanying note 233.

240. *See supra* note 237 and accompanying text.

241. Also excluded from the ban on pledging credit are:

- 1) “the investment of public trust funds,” FLA. CONST. art. VII, § 10(a);
- 2) “the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities,” FLA. CONST. art. VII, § 10 (b); and
- 3) “a municipality, county, special district, or agency of any of them, being a joint owner of, giving, lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person,”

FLA. CONST. art. VII, § 10(d). The author has no difficulty with these and suggest they remain unchanged with the following possible exception; that there be added to section 10(d) those projects found in FLA. CONST. art. VII, §§ 14-17.

finance or refinance the cost of capital projects for *airport or port facilities*<sup>242</sup> or (2) revenue bonds to finance or refinance the cost of capital projects for *industrial or manufacturing plants* to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived solely from revenue derived from the sale, operation or leasing of the projects . . . .<sup>243</sup>

Read literally, except for the four exceptions<sup>244</sup> contained in this provision, the rigid restrictions on revenue bond financing of projects for the private sector would apparently still apply. The first major case to interpret this constitutional section may or may not have so held. The court stated:

All other proposed public revenue bond projects not falling into the exempted class described in section 10(c) of article VII would, of course, have to run the gauntlet of prior case decisions to test whether the lending or use of public credit for any of them was contemplated . . . . It will be noted that under similar language in the 1885 Constitution . . . the cases hold that the validity of each proposed public revenue bond financing project depends upon the circumstances, e.g., whether the purpose serves a *paramount public purpose*, although there might be an incidental private benefit, and other criteria.<sup>245</sup>

At this point in the supreme court's opinion, it appeared to be on the verge of a glaring oversight. The applicable provision regarding revenue bonds in the 1885 Constitution had included the words "obtaining money for"<sup>246</sup> as a means of pledging the public credit. Those words are conspicuously left out of the 1968 Constitution. Thus, since a change in language from an earlier to a later constitution is to be accorded meaning,<sup>247</sup> it could clearly be argued, as was ultimately done in *Nohrr*, that revenue

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242. See *supra* note 237 and accompanying text (emphasis added).

243. FLA. CONST. art. VII, § 10(c) (emphasis added).

244. The exceptions are "airports and port facilities" and "industrial and manufacturing plants." *Id.*

245. *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 308-09 (Fla. 1971) (emphasis added); see, e.g., *State v. Jacksonville Port Auth.*, 204 So. 2d 881 (Fla. 1967) (presenting an index to decisions of the supreme court of both sides of the subject), and referenced in that regard in *Nohrr*, 247 So. 2d at 309.

246. See *supra* text accompanying note 239.

247. See *State v. City of St. Augustine*, 235 So. 2d 1 (Fla. 1970); *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960).

bonds, frequently called “non recourse revenue bonds,”<sup>248</sup> are simply not pledges of the public credit at all since the bondholder can look for payment from the revenues generated by the project and not to any other revenue sources belonging to the government entity involved.<sup>249</sup>

In this opinion, even after saying that the rigid strictures of the 1885 Constitution (*paramount public purpose*) would apply, the court then found that the non recourse revenue bonds involved in this case, did not pledge the public credit:

Under the foregoing construction of Section 10(c), Article VII, the dormitory-cafeteria projects involved here are not revenue projects that contemplate the lending or use of the credit of the county or its commissioners. The word ‘credit’ as used in Fla. Const., art. VII, section 10 (1968), implies the imposition of some new financial liability on the part of the State or political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.

In order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody. Neither the full faith and credit nor the taxing power of the State of Florida or any political subdivision thereof is pledged to the payment of the principal of, or interest on, these revenue bonds. The purchasers of the revenue bonds may not look to any legal or moral obligation on the part of the state, county, or authority to pay any portion of the bonds.<sup>250</sup>

Thus, the Florida Supreme Court appeared to be saying that since non recourse revenue bonds are involved,<sup>251</sup> there is no pledge of public credit and the no pledging of public credit provision in article VII, section 10 of the 1968 Constitution should not even apply. Such a conclusion would be bolstered by the deletion of the “obtaining money for” language that had appeared in the 1885 Constitution.<sup>252</sup>

However, the court then appeared to return in part to its original view, that except for “airports and port facilities” and “industrial and manufactur-

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248. *Linscott*, 443 So. 2d at 101.

249. *See infra* text accompanying note 250.

250. *Nohrr*, 247 So. 2d at 309.

251. *See supra* text accompanying note 246.

252. *See supra* text accompanying notes 239, 246.

ing plants,” the rule under the cases interpreting the 1885 Constitution which required a paramount public purpose would still apply. The supreme court found that even though the school was private, a *public purpose* was served by aiding it to acquire a dormitory-cafeteria. The court stated that “[c]ertainly, the financing of college dormitories and dining facilities as an aid in providing for the education of the youth of this State is a public purpose.”<sup>253</sup>

It would thus appear that the *Nohrr* court had, albeit in a roundabout way, created an interpretation of the pledging credit provision of the 1968 Florida Constitution which required only a “public purpose” and not a “paramount public purpose” if no pledge of the public credit was involved, even if the project involved was not an “airport or port facility” or “industrial or manufacturing plant.”

This interpretation was not immediately followed and, indeed, it can be argued that *Nohrr* was misread. In *Orange County Industrial Development Authority v. State*,<sup>254</sup> the supreme court found that *Nohrr*:

establish[ed] a two-prong test for determining whether revenue bonds for . . . projects [other than for “airport and port facilities” and “industrial and manufacturing plants”] would be validly authorized pursuant to the constitution. The two criteria are (1) whether the revenue bonds contemplate a pledge of the credit of the state or political subdivision and (2) whether the funded project serves a paramount public purpose, although there might be an incidental private benefit.<sup>255</sup>

This reading of *Nohrr*, of course, ignores the fact that in the end, the *Nohrr* court found the necessity for only a public benefit, not a paramount one.<sup>256</sup> This difference will at once become significant. This significance

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253. *Nohrr*, 247 So. 2d at 309. The reader will note that the court gave great deference to the legislative determination that a public purpose was served by the project. The court stated Florida Statute, “section 243.19 . . . contains a finding by the legislature that projects financed under the Educational Facilities Law [as was the project in *Nohrr*] are, in effect, for a public purpose. . . . The finding of legislature is determinative . . . .” *Id.* (citations omitted).

254. 427 So. 2d 174 (Fla. 1983). Involved were industrial development revenue bonds. *Id.* at 176. They were clearly non recourse bonds. *Id.* at 179.

255. *Id.* at 178. The court, thus, emphasized the need for a paramount public purpose rather than merely a public purpose as *Nohrr* had suggested would be the case when non recourse revenue bonds were involved.

256. See *supra* text accompanying note 253.

occurs in *Linscott v. Orange County Industrial Development Authority*.<sup>257</sup>

With the adoption of the Constitution of 1968, the “*paramount public purpose*” test developed by case law under the Constitution of 1885 lost much of its viability. The test is still applicable when a pledge of public credit is involved, but where such pledge is not involved, . . . it is enough to show that a public purpose is served.<sup>258</sup>

This, of course, is the other reading of *Nohrr*<sup>259</sup> and apparently supersedes the interpretation of *Nohrr* found in *Orange County Industrial Development Authority v. State*.<sup>260</sup>

Based on the foregoing, it is suggested that article VII, section 10(c) of the 1968 Florida Constitution be amended to read:

(c) the issuance and sale by any county, municipality, special district or other local governmental body of non recourse revenue bonds for any project if any public purpose is served thereby. The term “non recourse revenue bond” means revenue bonds that are payable solely from revenue derived from the sale, operation or leasing of the projects. If any projects so financed, or any part thereof, are occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract shall be subject to taxation to the same extent as other privately owned property.

The reader will note three major changes from the present 10(c). First, the special status of “airport and port facilities” and “industrial and manufacturing plants” is removed. It is assumed that (1) that such projects could easily pass the “any public purpose” test in the proposed change, and (2) that it was never the intent of the drafters of the current 10(c) that such projects

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257. 443 So. 2d 97 (Fla. 1983).

258. *Id.* at 101 (emphasis added).

259. *See supra* text accompanying note 253.

260. *See supra* text accompanying notes 254-55. It should be noted, however, that Justices Overton and Ehrlich concurred in the result in *Linscott*, but not in the opinion of the majority. They did not write an opinion, so one is left to guess what they intended. *Linscott*, 443 So. 2d at 101. (Overton, J. & Ehrlich, J., concurring in decision only). It is, however, possible to conclude that they continued to believe that a paramount public purpose is required, even in *non recourse revenue* bond situations, but that such a purpose existed in *Linscott*. If this supposition is correct, then counting Justice Boyd’s dissent in *Linscott*, its major shift in emphasis was supported by a bare majority of the court. However, it has subsequently been followed. *See Northern Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992).

be supported by anything other than non resource revenue bonds and the present 10(c) says exactly that.<sup>261</sup>

Second, any hint of a limitation of the use of revenue bonds to capital projects was removed along with the removal of the "airports and port facilities" and "industrial and manufacturing plants language." That should also make it easier for the proposed change in 10(c) to support the issuance of arbitrage bonds by municipal corporations as discussed below.

Third, the limitation regarding the interest on such bonds being exempt from federal income taxation, which my proposal leaves out, seems to be more of a recognition of a then existing<sup>262</sup> and very malleable practice<sup>263</sup> which serves little practical purpose except that such bonds would be desirable at lower interest rates because no federal income tax would have to be paid on such interest. The author claims no expertise in bond finance, but can see no other purpose for this provision which he proposes to delete. Indeed, it appears that this practice now may be the case anyway. The bonds in *State v. City of Orlando*, below, were not limited to tax exempt obligations. While the supreme court refused to affirm the circuit courts validation of the bond issue, no comment was made by the court on the fact that some of the bonds were not tax exempt. Perhaps this was because the bond issue was seemingly held to be invalid on grounds other than a violation of article VII, section 10. It is impossible to say for sure.

In any event, as changed, section 10(c) seems to otherwise state the existing law as indicated in *Nohrr*<sup>264</sup> and *Linscott*.<sup>265</sup>

The purposed change to section 10(c) might, if a legislative history of such a change so indicates, also overturn the pernicious effect of the supreme court decision in *State v. City of Orlando*,<sup>266</sup> which is both meddlesome and poorly reasoned.<sup>267</sup> There, the court held, in effect, that

261. "The revenue bonds . . . [must be] payable *solely* from revenue derived from the sale, operation or leasing of the projects." FLA. CONST. art VII, § 10(c) (emphasis added).

262. See *supra* text accompanying note 235.

263. See *State v. Broward County*, 468 So. 2d 965 (Fla. 1985) (discussing the cap and other limitations on tax exempt bonds issued by a state caused by the Federal Deficit Reduction Act of 1984).

264. See *supra* text accompanying note 253.

265. See *supra* text accompanying notes 257-58.

266. 576 So. 2d 1315 (Fla. 1991). Orlando proposed to sell revenue bonds and use the proceeds to invest at a profit with other local government entities. *Id.* at 1316. The city might also borrow some of the money itself. *Id.*

267. The bonds involved were clearly non recourse revenue bonds. "[T]he bonds would be payable only from the funds derived from repayment of the loans by the local agencies." *City of Orlando*, 576 So. 2d at 1316. Nevertheless, the court mentioned the "paramount

a municipal corporation could not issue a type of non recourse revenue bond known as an arbitrage bond, that is, where the revenue raised from the bond issue is invested at an interest rate greater than that attached to the bond issue, thus raising money for the municipal corporation.<sup>268</sup>

After thorough review and discussion, the court approved the sale and issuance of arbitrage bonds by a municipal corporation in *State v. City of Panama City Beach*.<sup>269</sup> Then in *City of Orlando*, when faced with an arbitrage scheme more complex than the one in *City of Panama City Beach*,<sup>270</sup> the court retreated from its holding in the latter case.<sup>271</sup> It did so without significant reference to article VII, section 10. Rather, it found that "borrowing money for [the] primary purpose of reinvestment is not a valid municipal purpose as contemplated by article VIII, section 2(b) [of the Florida Constitution]."<sup>272</sup> This provision requires that municipal power be

public purpose" test. *Id.* at 1317. This is incorrect unless the court intended to *sub silentio* overrule *Linscott v. Orange County Industrial Development Authority*. See *supra* text accompanying notes 257-58. Yet this can hardly be the case since that test was reaffirmed in *North Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992), decided subsequent to *Orlando*. Justice Grimes, the author of the *Orlando* opinion, joined the majority opinion in the latter case. *Id.* at 443. In any event, the case did not apparently turn on the issue of article VII, section 10 of the Florida Constitution.

268. See *State v. City of Panama City Beach*, 529 So. 2d 250, 250-51 (Fla. 1988).

269. *Id.*

270. The difference in investment schemes is discussed *supra* note 266 and *infra* note 271.

271. The bond issue in *City of Panama City Beach* was relatively simple compared to the one in *Orlando*. The proceeds from the sale of what were clearly non recourse revenue bonds, or at least the "bulk" of such proceeds, was to be invested at a higher interest rate than the bonds paid. The profit was to be used for such municipal purposes as parks and recreational facilities. *City of Panama City Beach*, 529 So. 2d at 250. Therefore, it was not entirely clear whether the *Orlando* court actually overruled *City of Panama City Beach* or limited it to its facts, i.e. straight forward investment of the proceeds from the bond issue as opposed to the complicated *Orlando* scheme. The court stated "[a]ccordingly we recede from *State v. City of Panama City Beach* to the extent that it conflicts with this opinion." *City of Orlando*, 576 So. 2d at 1318. Subsequently, it has become clear that *City of Panama City Beach* was totally receded from, and effectively overruled. "*State v. City of Orlando* . . . held 'that borrowing money for the primary purpose of investment is not a valid municipal purpose . . .'" *Washington Shores Homeowners' Ass'n v. City of Orlando*, 602 So. 2d 1300, 1302 n.3 (Fla. 1992). This conclusion is not surprising since the *Orlando* court relied almost entirely on Justice McDonald's dissent in *City of Panama Beach*, which argued that borrowing money in order to invest it at a higher interest rate in order to make money is not a valid municipal purpose.

272. Article VII, section 10 issue was thoroughly discussed in *City of Panama City Beach*, 529 So. 2d at 253-54. The only reference to it in *Orlando* is the statement that, "[b]y allowing the city council to later decide how to spend the profits, the city has deprived this



exercised for municipal purposes.

To explain why the investing of non recourse revenue bond money in order to use the profit is not a municipal purpose, the court relied on the following reasoning of Justice McDonald<sup>273</sup> in his dissent in *City of Panama City Beach*. Justice McDonald saw “no valid public [municipal?] purpose in investing for investing’s sake. Making a profit on an investment is an aspect of commerce more properly left to commercial and business entities.”<sup>274</sup> What was ignored by the court, of course, is the fact that the profit from the investment would have to be used for a municipal purpose because of article VIII, section 2(b) of the Florida Constitution. To city governments already struggling to find additional sources of revenue to meet ever increasing demands for services and to a tax weary public, the court’s reasoning must seem, relatively speaking, to have come from out of the middle ages.<sup>275</sup>

This line of reasoning also undermines the Legislature’s attempt to restore broad municipal home rule power subsequent to the supreme court’s disastrous decision in *City of Miami Beach v. Fleetwood Hotel, Inc.*<sup>276</sup> As

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Court of the ability to determine whether the expenditures will meet a paramount [sic] public purpose.” *City of Orlando*, 576 So. 2d at 1317. This did not however turn out to be the issue on which the case was decided. *Id.*

273. *City of Orlando*, 576 So. 2d at 1315. Justice McDonald was Chief Justice at the time.

274. *City of Panama City Beach*, 529 So. 2d at 257. (McDonald, C.J., dissenting, and Overton & Ehrlich, J.J., concurring with dissent). Justice McDonald also argued that the arbitrage bonds served no public purpose. *Id.* at 252-58.

275. Sometimes words or phrases I have read in books or heard in movies come to mind and find themselves used in my writings because the movie or book context and the article context in which they are used seem somehow related. I recall this phrase from the Twentieth Century Fox movie on the life of the World War II German Field Marshal, Erwin Rommel, *The Desert Fox*. The phrase occurs when Rommel and General Fritz Bayerlein are discussing Hitler’s no retreat order during the Battle of El Alamein, when the Afrika Korps and its Italian allies were faced with the overwhelming quantitative and, in some instances, qualitative, superiority of the British Eighth Army. Bayerlein, speaking to Rommel: “It’s [Hitler’s order] out of the Middle Ages. This is an order to throw away an entire army. Nobody has said ‘victory or death’ since people fought with bows and arrows.” Justice McDonald’s argument is not an order “to throw away an entire army” and certainly there is absolutely no intent on my part to equate Justice McDonald or away other justice, with Hitler, *but* the argument *is* an argument to throw away a unique, valuable source of non tax municipal revenue at a time when new sources of that type are almost impossible to find.

276. 261 So. 2d 801 (Fla. 1972). This case gutted article VIII, section 2(b) of the then new 1968 Constitution by placing an artificially narrow interpretation on the term “municipal purpose” This caused the Legislature to undo *Fleetwood* by enacting chapter 73-129 of the Laws of Florida 1973, which restored the term “municipal purpose” to its intended meaning.

was previously stated, the question of whether or not the issuance of non recourse revenue bonds for arbitrage purposes was a valid municipal purpose was thoroughly discussed in *City of Panama City Beach* and arbitrage bonds were found to constitute both a public and a municipal purpose.<sup>277</sup>

Hopefully, the proposed change in 10(c) would restore the law as it was before *Orlando*. Should any doubt exist on this score, the author recommends that another section be added to article VII specifically stating that non recourse revenue arbitrage bonds serve both a public and municipal purpose.

This discussion has caused the author to also make the following suggestions when changes to the bond provisions of article VII of the 1968 Florida Constitution are being considered. As far as I can determine, there does not exist any consistent definition of the types of bonds based on their funding. I suggest that the constitution define three basic type of bonds.

- 1) *Non recourse revenue bonds* as defined above.<sup>278</sup>
- 2) *Special obligation bonds*<sup>279</sup> which pledge some<sup>280</sup> but not all<sup>281</sup>

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See generally the discussion of this subject in 1973 Fla. Att'y Gen. Ann. Rep. 450 (1973); see also *City of Panama City Beach*, which ignored *Fleetwood* and appears to adopt the original view of "municipal purpose." 529 So. 2d at 250. Alarming, the dissent of Justice McDonald in *City of Panama City Beach* relied almost entirely on *Fleetwood* for its municipal purpose argument, *id.* at 257 (McDonald, C.J. dissenting and Overton & Ehrlich, J.J., concurring with dissent.) Even more alarming, it is this argument upon which the court's opinion in *Orlando* is based. See *supra* text accompanying note 272.

277. *City of Panama City Beach*, 529 So. 2d at 254-56.

278. See *supra* text accompanying note 250.

279. This term was directly used in *State v. Alachua County*, 335 So. 2d 554, 555 (Fla. 1976) and indirectly in *Town of Medley v. State*, 162 So. 2d 257, 258-259 (Fla. 1964).

280. See *Town of Medley*, 162 So. 2d at 257; *Alachua County*, 335 So. 2d at 554. In the former, the Town of Medley pledged the following toward the payment of "Public Improvement Revenue Bonds": "the revenues from a proposed water system, [p]roceeds of the cigarette tax, franchise tax on electric power, utility taxes and occupational license taxes." *Town of Medley*, 162 So. 2d at 257. "No ad valorem taxes were pledged and the form of the proposed bond and the ordinance authorizing the issue specifically provides that the Town is not 'directly or indirectly or contingently' obligated to levy ad valorem taxes for the payment thereof." *Id.* at 257-58. In spite of the fact that

[i]n any instance in which a municipality has been using funds from special non-ad valorem sources of revenue to meet its operating costs and then diverts those funds by pledging them to payment of a specific indebtedness as done here, the result will probably be that ad valorem taxes will have to be increased to make up the deficiency in funds available for operating expenses,

the bonds were held not to be a pledge of ad valorem taxes so as to trigger the constitutional requirement for a referendum. *Id.* at 258. The Alachua County case is to the same effect.

local government sources of revenue but exclude the direct or indirect<sup>282</sup> pledge of ad valorem taxes on ad valorem tax increments.<sup>283</sup>

3) *General obligation bonds* which pledge the full taxing power of the taxing entity including ad valorem taxes on real property and tangible personal property at the local government level. These would continue to require referendum approval<sup>284</sup> with the exceptions now found in the constitution.<sup>285</sup>

# VII. ARTICLE XI, SECTION 3: THE REHABILITATION OF THE CONSTITUTIONAL RIGHT OF THE PEOPLE TO PROPOSE CHANGES TO THE FLORIDA CONSTITUTION—UNDOING THE MALIGNANT EFFECT OF *FINE V. FIRESTONE*<sup>286</sup>

In the 1968 Florida Constitution, the people of this state for the first time, were given the right to propose amendments to the constitution

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281. In *Volusia County v. State*, 417 So. 2d 968 (Fla. 1982), the Florida Supreme Court distinguished *Medley* and *Alachua* and held that where a local government pledged “all legally available, unencumbered sources of county revenue including all money derived from regulatory fees and user charges assessed by the county.” *Id.* at 969. This amounted to a pledge of ad valorem tax revenues which would obviously be required to take up the slack, thus triggering the referendum requirement of article VII, section 12 of the Florida Constitution. *Id.* at 972. The fact that the county had also “covenant[ed] to do all things necessary to continue receiving the various revenues pledged . . . to fully maintain the programs and services which generate the service fees and user charges.” *Id.* at 969, 971.

282. *Volusia County*, 417 So. 2d at 968.

283. See *State v. City of Daytona Beach*, 484 So. 2d 1214 (Fla. 1986).

284. See FLA. CONST. art. VII, §§ 11, 12.

285. See *id.* §§ 14, 17.

286. 448 So. 2d 984 (Fla. 1984). Regrettably, the author of this section has deemed it necessary to levy very harsh criticism at the *Fine* opinion. This will undoubtedly be read by some to reflect poorly on the author of this opinion, Justice Overton and all of the remaining justices, since there were no dissents. However, the author has a very high regard for the court, Justice Overton and each of the other justices who participated in the *Fine* decision. Nevertheless, he believes that they fell into the common judicial trap of legislating in this case by misapplying the clear meaning of the constitution to avoid a result which may be seen as harmful or even disastrous to the body politic. This is certainly not the first time a court has done this or something like it nor will it be the last. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). Many other state and federal cases could be cited. I also respectfully confess that it is far easier to play “Monday morning quarterback” as I am doing than to have to reach a decision in a factual situation where an unusually hard case may very well make, as here, what I believe to be bad law. I do hope, however, that from the perspective of the time that has passed since *Fine v. Firestone* was decided that my criticisms will be seen as having a respectable validity.

through a process called “initiative”<sup>287</sup>. At first, the scope of changes proposed through this process<sup>288</sup> was very narrow, and limited to changing only sections of the constitution at a time.<sup>289</sup> The first case to interpret this provision, *Adams v. Gunter*,<sup>290</sup> held that an amendment proposed by initiative could not remain on the ballot because its effect would be to change more than one section of the constitution.

Obviously being dissatisfied with the narrow interpretation of the peoples’ right to propose changes through the initiative process,<sup>291</sup> the Legislature placed on the ballot a change in this process that would give the people “the power to propose the revision or amendment of any portion or portions of this constitution” so long as it “embraces but one subject and matter directly connected therewith.”<sup>292</sup> Early cases interpreted this provision broadly. The majority opinion in the first case to interpret the changed initiative provision, *Weber v. Smathers*,<sup>293</sup> is exceedingly short on explanation<sup>294</sup> and is much better described in a subsequent case, *Floridians Against Casino Takeover v. Let’s Help Florida*:<sup>295</sup>

287. See FLA. CONST. art. XI, § 3 (amended 1972).

288. There are four other ways by which proposed changes to the constitution can be placed on the ballot. See *id.* § 1 (proposal by Legislature); *id.* § 2 (revision commission); *id.* § 4 (constitutional convention); *id.* § 6 (taxation and budget reform commission).

289. As pointed out in *Fine v. Firestone*, the original initiative provision provided in pertinent part that “[t]he power to propose amendments to any section of this constitution by initiative is reserved to the people.” *Fine*, 448 So. 2d at 989 n.2 (emphasis added).

290. 238 So. 2d 824 (Fla. 1970).

291. “As I construe the 1972 change in light of what was present in the Constitution before, what was retained in other sections, and *Adams*, it seems to me obvious that the 1972 change was designed to enlarge the right to amend the Constitution by initiative petition.” *Weber v. Smathers*, 338 So. 2d 819, 823 (1976) (England, J., concurring).

See also the following:

In response to [*Adams v. Gunter*] which narrowly interpreted the original “single section” initiative provision, the people adopted a legislatively-proposed amendment to article XI, section 3, to provide for revision or amendment of “any portion or portions” of the constitution by initiative, upon the condition that the proposal embrace a single subject and matter directly connected therewith H.J.R. no. 2835, pp. 1665, Laws of Florida (1972).

*Floridians Against Casino Takeover v. Lets Help Fla.*, 363 So. 2d 337, 340 (Fla. 1978), receded from by *Fine*, 448 So. 2d at 984.

292. FLA. CONST. art. XI, § 3.

293. 338 So. 2d at 819.

294. *Id.* The case is however greatly enhanced by Justice England’s concurring opinion which is here drawn upon rather heavily. See *Weber*, 338 So. 2d at 822-24, (England J., concurring).

295. 363 So. 2d 337 (Fla. 1978).

In this first decision to deal with the initiative process subsequent to the 1972 amendment several principles evolved which, to our mind, settled the standard of review by the judiciary when confronted by an assault upon a particular initiative proposal. First, "the 1972 change was designed to enlarge the right to amend the Constitution by initiative provision." [Weber v. Smathers, 338 So. 2d at 823 (England, J., concurring).] Second, the burden upon the opponent is to establish that the initiative proposal "is clearly and conclusively defective." [*Id.* at 822.] Third, "the 'one subject' limitation was selected to place a functional, as opposed to a locational, restraint on the range of authorized amendments." [*Id.* at 823 (England, J., concurring).] Last, in applying the foregoing principles to the amendment there under consideration, which arguably embraced at least five "subjects" ranging from financial disclosure by public officials to limitations on lobbyists and civil penalties on nongovernmental employees, the philosophy emerged that the one subject limitation should be viewed broadly rather than narrowly. The narrow view would have compelled a finding that at least five "subjects" were embraced within the proposal. The broad view accepted, in fact, by the Court led to the upholding of the proposal as a single subject—"ethics in government."<sup>296</sup>

The Florida Supreme Court in *Floridians Against Casino Takeover* was perhaps even more generous in applying the approach it had gleaned from *Weber* to the facts before it, an approach it described as possessing a "pragmatic and common sense judicial philosophy."<sup>297</sup>

The present proposal [at issue] (1) authorizes state regulated, privately operated casino gambling in a specific geographical area and (2) directs the anticipated tax revenues from that source to education and local law enforcement. . . . [T]he generation and collection of taxes, and the distribution thereof [are] part and parcel of the single subject of legalized casino gambling. In both instances [*Weber* and the present case] the various elements serve to flesh out and implement the initiative proposal, thereby forging an integrated and unified whole.<sup>298</sup>

The court in *Floridians Against Casino Takeover* also relied on a suggestion Justice England had made in his concurring opinion in *Weber*.

Furthermore, as perceived by Justice England in *Weber*, it seems

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296. *Id.* at 340 (footnotes omitted).

297. *Id.*

298. *Id.*

appropriate to draw a parallel between Article XI, Section 3, and Article III, Section 6, Florida Constitution, because each utilizes the restraining phrase "shall embrace but one subject." The former applies to the constitutional initiative process while the latter deals with enactment of laws by the legislature. However, the need for germanity is common to both. Noting that there "is gloss aplenty on the 'one subject' limitation for legislation" [Justice England] concluded "that widely divergent rights and requirements can be included without challenge in statutes covering a single subject *area*."<sup>299</sup>

Thus, the 1972 amendment overturning the narrow "one section" limitation was to be given broad effect, fulfilling what had been said much earlier by Justice Terrell: "[W]e are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution."<sup>300</sup>

Subsequently, the Florida Supreme Court was faced with the "Citizens' Choice Amendment on Government Revenue" which was placed on the ballot by initiative.<sup>301</sup> It proposed to place a cap on most government sources of revenue.<sup>302</sup> The First District Court of Appeal upheld the validity of the proposed amendment.<sup>303</sup>

[T]he proposed amendment in this case contains various elements within the ambit of the single subject of revenue limitation, and the petitioner [*Fine*] has not established that the proposal is 'clearly and conclusively defective' within the purview of article XI, section 3, Florida Constitution.<sup>304</sup>

It is beyond cavil that the adoption of this revenue limiting proposal would have had a profound effect on government at all levels in the State of Florida. It is certainly arguable that the supreme court decided that the proposed amendment would be bad for the state and thus set out to find that it violated the single subject rule. In this it succeeded. However, it also

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299. *Id.* at 340-41.

300. *Weber*, 338 So. 2d at 821 (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)); *see also infra* note 339.

301. *Fine*, 448 So. 2d at 986.

302. *Id.* at 986-87.

303. *Id.* at 985.

304. *Id.* at 987 (quoting *Fine v. Firestone*, 443 So. 2d 253, 257 (Fla. 1st Dist. Ct. App. 1983)).

succeeded in inflicting exceedingly severe injury on the right of the people, themselves, to effectively place an amendment on the ballot because the liberality of *Weber v. Smathers*<sup>305</sup> and *Floridians Against Casino Takeover v. Let's Help Florida*<sup>306</sup> was substantially impaired if not destroyed. The *Fine* opinion is arguably thinly veiled judicial legislation.

The court began its attack on the revenue cap proposal, and thus on the interpretational structure erected by *Weber*<sup>307</sup> and *Floridians Against Casino Takeover*,<sup>308</sup> by placing great emphasis on the fact that a proposal placed on the ballot by initiative did not, of necessity, go through a process of hearings and debate which it described as "filtration."<sup>309</sup> The other means<sup>310</sup> by which amendments may be placed on the ballot do have such processes.<sup>311</sup> In reading the court's discussion of the initiative method of placing a proposal on the ballot as compared to the other methods, the reader could be led to believe that this subject had never been addressed by the court before. Quite the contrary is true.

The issue of "filtration" was thoroughly discussed in Justice England's concurring opinion in *Weber*.<sup>312</sup>

[B]ut surely in light of 1968 concerns over populist overhauls by non-deliberative petitions [referring to Justice Robert's dissent] we can deduce an intention to restrain initiative in a manner comparable to restraints on the legislature. The same term, of course, appears in Article III, Section 6, which states that laws developed in the legislature "shall embrace but one subject."<sup>313</sup> It makes a great deal of sense to me to view the same phraseology in the Constitution, operating in both cases as a functional limitation on our written laws (one statutory, the other organic), as having the same meaning. At least no justification for a differentiation is here made to appear.<sup>314</sup>

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305. 338 So. 2d at 819; *see supra* text accompanying notes 293-96.

306. 363 So. 2d at 337; *see supra* text accompanying notes 297-99.

307. *See supra* note 305.

308. *See supra* note 306.

309. *Fine*, 448 So. 2d at 988.

310. *See supra* note 288. The *Fine* court did not include the Taxation and Budget Reform Commission (art. XI, section 6) which was added later, but without doubt would have considered that it provided "filtration."

311. *Fine*, 448 So. 2d at 988.

312. 338 So. 2d at 819.

313. *See infra* text accompanying note 320.

314. *Weber*, 338 So. 2d at 823 (England, J., concurring) (footnotes omitted); *see infra* text accompanying note 318.

As was pointed out earlier,<sup>315</sup> Justice England's equation of the two single subject limitations<sup>316</sup> was accepted by the court in *Floridians Against Casino Gambling*.<sup>317</sup> The *Fine* court receded from this equation between the two.

We find it is proper to distinguish between the two. First, we find the language "shall embrace but one subject and matter *properly connected* therewith" in article III, section 6, regarding statutory change by the legislature is broader than the language "shall embrace but one subject and matter *directly connected* therewith," in article XI, section 3, regarding constitutional change by initiative. . . . [W]e find that we should take a broader view of the legislative provision because any proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption. [This is sophistry because the "change" could as easily add additional subjects as delete them. This observation makes the next sentence in this quote from the court's opinion nonsensical and contrived if one is talking about the single subject requirement.] This process is, in itself, a restriction on the drafting of a proposal which is not applicable to the scheme for constitutional revision or amendment by initiative. . . . [M]ost important, we find that we should require strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature.<sup>318</sup>

The *Fine* court's distinction between "properly" and "directly," had already been demolished by Justice England in *Weber*.<sup>319</sup> He stated that "[t]his distinction is not critical here, however, since the debate between the parties involves the number of 'subjects' in the proposal before us and not its peripheral 'matters.'"<sup>320</sup> It would seem that as in *Weber*, at issue in *Fine* was the number of subjects, not "peripheral matters."

The court in *Fine* set-up a strawman only to knock it down.

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315. See *supra* text accompanying note 299.

316. *Weber*, 338 So. 2d at 823.

317. 363 So. 2d at 340-41.

318. *Fine*, 448 So. 2d at 988-89 (emphasis added). It is uncertain how one should take the implication in the last sentence that perhaps the single subject limitation on the Legislature does not "require strict compliance."

319. See *supra* text accompanying notes 315-17.

320. *Weber*, 338 So. 2d at 823 n.4 (England, J., concurring).



The problem of conflicting provisions resulting from the adoption of an initiative proposal cannot be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict. We recede from *Floridians* [*Against Casino Takeover*] to the extent that it conflicts with this view.<sup>321</sup>

The court in *Fine* then went on to bemoan the fact that this problem would place upon its shoulders the burden of harmonizing conflicting provisions without its having the benefit of any legislative history or similar indicia of meaning or intent of the drafters of the proposal.<sup>322</sup> Furthermore, the court offered no clear explanation, or arguably no explanation at all, how its narrow interpretation of the words "directly connected" would solve the problem of conflicting provisions.<sup>323</sup>

Then, perhaps most damaging of all to the ability of the people of Florida to change their constitution,<sup>324</sup> the *Fine* court receded from its holding in *Floridians Against Casino Takeover*<sup>325</sup>

that the question of whether an initiative proposal conflicted with other articles or sections of the constitution had "no place in assessing the legitimacy of an initiative proposal." We recede from that language and find that how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal.<sup>326</sup>

There can be little doubt that lurking in that one sentence is the spectre of the court's drifting back to the "one section" limitation on initiative proposals. The 1972 change that was intended to excise that limit.<sup>327</sup> If

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321. *Fine*, 448 So. 2d at 989.

322. *Id.*

323. It should not be all that difficult to determine how the new proposal would have affected the existing constitution. Certainly it would not appear to have been that difficult under the facts of *Fine*.

324. See *supra* text accompanying note 300.

325. 363 So. 2d at 337.

326. *Fine*, 448 So. 2d at 990 (citation omitted).

327. See *supra* note 291; see also Justice Kogan's concurring and dissenting opinion, in Advisory Opinion to the Attorney General, 592 So. 2d 225 (Fla. 1991). There, Justice Kogan suggested that the single subject rule is violated "[i]f the proposed initiative contains more than one separate issue about which the voters might differ." *Id.* at 231. (Kogan, J., concurring in part and dissenting in part.) He explained further in a footnote.

the court can now measure the number of subjects in an initiative proposal by its effect on "other articles or sections"<sup>328</sup> of the constitution there is little or nothing to stop the court from finding such "effect" creates additional subjects and thence travel back down the road to the discredited and changed "one section" rule.

The court, not surprisingly, found that rather than one subject, "government revenue,"<sup>329</sup> the initiative proposal actually contained three: 1) "restrict[ions on] all types of taxation utilized for general governmental operations;"<sup>330</sup> 2) "restriction on the operation and expansion of all user-fee services;"<sup>331</sup> and 3) "the substantial effect it [would have] on the constitutional scheme for the funding of capital improvements with revenue bonds."<sup>332</sup> There can be little, if indeed any, doubt that these three "subjects," as the court found them to be, would, under the prior case law<sup>333</sup> which the court "trashed,"<sup>334</sup> have been found to be matters "directly connected" to the single subject of limitations on government revenue.

There can be little, indeed no, doubt that the court's probable objective in preventing the people from voting on a proposal it deemed harmful to the State of Florida had been achieved. However, it was achieved at a terrible cost to the right of the people to control their constitutional destiny<sup>335</sup> without recourse to the Legislature, revision commission, constitutional

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I do not suggest that an initiative contains multiple subjects if reasonable voters might disagree with some integral component by which the initiative achieves its purposes. Rather, such disagreement must be about matters that, if severed, would leave at least two complete and workable proposals. If so, the component is discrete and not integral. If the disagreement is about a matter that cannot be severed without rendering the remainder absurd, then the initiative must stand or fall as a unit when put to the voters.

*Id.* at 231 n.5 (Kogan, J., concurring in part and dissenting in part).

In *Advisory Opinion to the Attorney General*, the court found a single subject, even when applying the *Fine* test. "The sole subject of the proposed amendment is limiting the number of consecutive terms that certain elected public officers may serve." *Id.* at 227. The question of how proposed change would "affect other articles or sections of the constitution," *Fine*, 448 So. 2d at 990, was given little weight. *Advisory Opinion*, 592 So. 2d at 225. Indeed, *Weber* rather than *Fine* was cited. *Id.* The reader can reach whatever conclusions he or she wishes from this.

328. *Fine*, 448 So. 2d at 990.

329. *Id.*

330. *Id.*

331. *Id.* at 991.

332. *Id.*

333. See *supra* text accompanying notes 293-99.

334. The reader will forgive the slang. Somehow its use seemed appropriate.

335. See *supra* note 291.

convention or taxation and budget reform commission.<sup>336</sup> Once again the reader needs to be reminded of the words of Justice Terrell as quoted by Justice Overton in one of the latter's earlier opinions. "[W]e are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution."<sup>337</sup> And, "neither the wisdom of the provision nor the quality of its draftsmanship is a matter for our review."<sup>338</sup>

In light of this earlier disclaimer by Justice Overton, the following language from *Fine* reads like overdone protest.<sup>339</sup>

We are mindful that it is not our responsibility to address the wisdom or merit of this proposed initiative amendment and we have not done so. Solely on the basis of the legal issue presented to this court, we find that the Citizens' Choice proposal is clearly and conclusively defective because it fails to meet the intent and purpose of the single-subject requirement of article XI, section 3 of the Florida Constitution.<sup>340</sup>

To remedy this judicial dismantling of the initiative provision, we propose that the word "directly" in article XI, section 3 be changed to "properly" to bring it in line with the single subject limitation on legislation found in article III, section 6 of the Florida Constitution. Then, in the words of Justice England: "There is gloss aplenty on the 'one subject'

336. *Id.*

337. *Weber*, 338 So. 2d at 821 (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). The reader should note that although Justice Terrell was talking about a legislatively proposed amendment to the constitution, Justice Overton used the quote in the context of an amendment proposed by initiative in *Weber*.

338. *Id.* at 822 (citing *Gray v. Childs*, 156 So. 274 (1934)).

339. "[He] doth protest too much, me thinks." Shakespeare, *Hamlet*, act III, scene 2, Line 242. John Bartlett, *Familiar Quotations*, 94 (Christopher Morely & Lovella D. Everett eds., 12th ed. 1951) (1948).

340. *Fine*, 448 So. 2d at 992-93. It is disingenuous at best for the court to include the following words from Justice Thornal's concurring opinion in *Adams v. Gunter* when they were directed at the earlier discredited constitutional provision which limited change by initiative to one section of the Constitution. See *supra* text accompanying notes 289, 290. "The single subject rule of restraint is a provision 'which the people themselves have incorporated in our Constitution to protect it against precipitous and spasmodic changes in organic law.' *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970) (Thornal, J., concurring);" *Fine*, 448 So. 2d at 993.

To remedy this judicial dismantling of the initiative provision, we propose that the word “directly” in article XI, section 3 be changed to “properly” to bring it in line with the single subject limitation on legislation found in article III, section 6 of the Florida Constitution. Then, in the words of Justice England: “There is gloss aplenty on the ‘one subject’ limitation for legislation, and we know that widely divergent rights and requirements can be included without challenge in statutes covering a single subject area.”<sup>341</sup>

To deal with an issue that *could cause* a real problem, we also propose that the following sentence be added to the end of article XI, section 3, the initiative provision: Such revision or amendment shall not contain proposed changes in the Constitution that conflict with each other.

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341. *Weber*, 338 So. 2d at 823 (England, J., concurring) (footnotes omitted). *See also supra* text accompanying note 299.



**PART VII**  
**BIBLIOGRAPHY**  
**ON THE**  
**FLORIDA CONSTITUTION**

## Bibliography\*

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The materials listed in this Bibliography reflect on either a particular portion or issue of Florida constitutional law or on the Florida Constitution in general. Even a cursory review of these materials provides a “snapshot” of the issues and events that shape the State of Florida. The sources are organized under the Article(s) upon which they most bear. The most comprehensive of sources are included under “General Coverage.” Names of periodicals are abbreviated in accordance with *The Bluebook: A Uniform System of Citation*, Fifteenth edition.

As a supplement to the articles contained within this issue, an excellent source on post-1968 revision matters can be found in *Florida State University Law Review* 6, no. 3 (1978). That issue was solely dedicated to the 1978 Constitutional Revision Commission and many of the articles contained therein are useful to this date.

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**PART VIII**  
**THE CONSTITUTION OF THE  
STATE OF FLORIDA**

*The Nova Law Review has reproduced the Florida Constitution in full, including the 1992 amendments, to further enhance this Symposium as a resource tool. We would like to thank Phil Herron, Chief Analyst with the Division of Statute Revision, for his assistance.*

THE  
CONSTITUTION  
of the  
STATE OF FLORIDA  
as revised in  
1968  
and subsequently amended

The Constitution of the State of Florida as revised in 1968 consisted of certain revised articles as proposed by three joint resolutions which were adopted during the special session of June 24-July 3, 1968, and ratified by the electorate on November 5, 1968, together with one article carried forward from the Constitution of 1885, as amended. The articles proposed in House Joint Resolution 1-2X constituted the entire revised constitution with the exception of Articles V, VI, and VIII. Senate Joint Resolution 4-2X proposed Article VI, relating to suffrage and elections. Senate Joint Resolution 5-2X proposed a new Article VIII, relating to local government. Article V, relating to the judiciary, was carried forward from the Constitution of 1885, as amended.

Sections composing the 1968 revision have no history notes. Subsequent changes are indicated by notes appended to the affected sections. The indexes appearing at the beginning of each article, notes appearing at the end of various sections, and section and subsection headings are added editorially and are not to be considered as part of the constitution.

## PREAMBLE

We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution.

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## ARTICLE I

### DECLARATION OF RIGHTS

Sec.

1. Political power.
2. Basic rights.
3. Religious freedom.
4. Freedom of speech and press.
5. Right to assemble.
6. Right to work.
7. Military power.
8. Right to bear arms.
9. Due process.
10. Prohibited laws.
11. Imprisonment for debt.
12. Searches and seizures.
13. Habeas corpus.
14. Pretrial release and detention.
15. Prosecution for crime; offenses committed by children.
16. Rights of accused and of victims.
17. Excessive punishments.
18. Administrative penalties.
19. Costs.
20. Treason.
21. Access to courts.
22. Trial by jury.
23. Right of privacy.
24. Access to public records meetings.
25. Taxpayers' Bill of Rights.

**SECTION 1. Political power.**—All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

**SECTION 2. Basic rights.**—All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

*History.*—Am. S.J.R. 917, 1974; adopted 1974.

**SECTION 3. Religious freedom.**—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

**SECTION 4. Freedom of speech and press.**—Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

**SECTION 5. Right to assemble.**—The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.

**SECTION 6. Right to work.**—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

**SECTION 7. Military power.**—The military power shall be subordinate to the civil.

**SECTION 8. Right to bear arms.—**

(a) The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.

(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.

(d) This restriction shall not apply to a trade in of another handgun.

*History.*—Am. C.S. for S.J.R. 43, 1989; adopted 1990.

**SECTION 9. Due process.**—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

**SECTION 10. Prohibited laws.**—No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

**SECTION 11. Imprisonment for debt.**—No person shall be imprisoned for debt, except in cases of fraud.

**SECTION 12. Searches and seizures.**—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme

Court construing the 4th Amendment to the United States Constitution.

**History.**—Am. H.J.R. 31-H, 1982; adopted 1982.

**SECTION 13. Habeas corpus.**—The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

**SECTION 14. Pretrial release and detention.**—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

**History.**—Am. H.J.R. 43-H, 1982; adopted 1982.

**SECTION 15. Prosecution for crime; offenses committed by children.**—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

**SECTION 16. Rights of accused and of victims.**

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that



area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

**History.**—Am. S.J.R. 135, 1987; adopted 1988.

**SECTION 17. Excessive punishments.**—Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

**SECTION 18. Administrative penalties.**—No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

**SECTION 19. Costs.**—No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final.

**SECTION 20. Treason.**—Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.

**SECTION 21. Access to courts.**—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

**SECTION 22. Trial by jury.**—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

**SECTION 23. Right of privacy.**—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

**History.**—Added, C.S. for H.J.R. 387, 1980; adopted 1980.

**SECTION 24. Access to public records and meetings.—**

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

(c) This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

(d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

*History.*—Added, C.S. for C.S. for H.J.R.'s 1727, 863, 2035, 1992; adopted 1992.

**SECTION 25. Taxpayers' Bill of Rights.**—By general law the legislature shall prescribe and adopt a Taxpayers' Bill of Rights that, in clear and concise language, sets forth taxpayers' rights and responsibilities

and government's responsibilities to deal fairly with taxpayers under the laws of this state. This section shall be effective July 1, 1993.

**History.**—Proposed by Taxation and Budget Reform Commission, Revision No. 2, 1992, filed with the Secretary of State May 7, 1992; adopted 1992.

<sup>1</sup>**Note.**—This section, originally designated section 24 by Revision No. 2 of the Taxation and Budget Reform Commission, 1992, was redesignated section 25 by the editors in order to avoid confusion with section 24 as contained in H.J.R.'s 1727, 863, 2035, 1992.

## ARTICLE II

### GENERAL PROVISIONS

Sec.

1. State boundaries.
2. Seat of government.
3. Branches of government.
4. State seal and flag.
5. Public officers.
6. Enemy attack.
7. Natural resources and scenic beauty.
8. Ethics in government.
9. English is the official language of Florida.

#### SECTION 1. State boundaries.—

(a) The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30°16'53" north and longitude 87°31'06" west intersect; thence to the point where latitude 30°17'02" north and longitude 87°31'06" west intersect; thence to the point where latitude 30°18'00" north and longitude 87°27'08" west intersect; thence to the point where the center line of the Intracoastal Canal (as the same existed on June 12, 1953) and longitude 87°27'00" west intersect; the same being in the middle of the Perdido River; thence up the middle of the Perdido River to the point where it intersects the south boundary of the State of Alabama, being also the point of intersection of the middle of the Perdido River with latitude 31°00'00" north; thence east, along the south boundary line of the State of Alabama, the same being latitude 31°00'00" north to the middle of the Chattahoochee River; thence down the middle of said river to its confluence with the Flint River; thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf

Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured on a line bearing south 0°01'00" west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St. Marys River, east of the Perdido River, and south of the States of Alabama and Georgia.

(b) The coastal boundaries may be extended by statute to the limits permitted by the laws of the United States or international law.

**SECTION 2. Seat of government.**—The seat of government shall be the City of Tallahassee, in Leon County, where the offices of the governor, lieutenant governor, cabinet members and the supreme court shall be maintained and the sessions of the legislature shall be held; provided that, in time of invasion or grave emergency, the governor by proclamation may for the period of the emergency transfer the seat of government to another place.

**SECTION 3. Branches of government.**—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

**SECTION 4. State seal and flag.**—The design of the great seal and flag of the state shall be prescribed by law.

**SECTION 5. Public officers.**—

(a) No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any

other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

(b) Each state and county officer, before entering upon the duties of the office, shall give bond as required by law, and shall swear or affirm:

"I do solemnly swear (or affirm) that I will support, protect, and defend the Constitution and Government of the United States and of the State of Florida; that I am duly qualified to hold office under the Constitution of the state; and that I will well and faithfully perform the duties of (title of office) on which I am now about to enter. So help me God.",  
and thereafter shall devote personal attention to the duties of the office, and continue in office until his successor qualifies.

(c) The powers, duties, compensation and method of payment of state and county officers shall be fixed by law.

*History.*—Am. H.J.R. 1616, 1988; adopted 1988.

**SECTION 6. Enemy attack.**—In periods of emergency resulting from enemy attack the legislature shall have power to provide for prompt and temporary succession to the powers and duties of all public offices the incumbents of which may become unavailable to execute the functions of their offices, and to adopt such other measures as may be necessary and appropriate to insure the continuity of governmental operations during the emergency. In exercising these powers, the legislature may depart from other requirements of this constitution, but only to the extent necessary to meet the emergency.

**SECTION 7. Natural resources and scenic beauty.**—It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise.

**SECTION 8. Ethics in government.**—A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:

(a) All elected constitutional officers and candidates for such offices and, as may be determined by law, other public officers, candidates, and employees shall file full and public disclosure of their financial interests.

(b) All elected public officers and candidates for such offices shall file full and public disclosure of their campaign finances.

(c) Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law.

(d) Any public officer or employee who is convicted of a felony involving a breach of public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law.

(e) No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law.

(f) There shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.

(g) This section shall not be construed to limit disclosures and prohibitions which may be established by law to preserve the public trust and avoid conflicts between public duties and private interests.

(h) Schedule—On the effective date of this amendment and until changed by law:

(1) Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of \$1,000 and its value together with one of the following:

a. A copy of the person's most recent federal income tax return; or

b. A sworn statement which identifies each separate source and amount of income which exceeds \$1,000. The forms for such source disclosure and the rules under which they are to be filed shall be prescribed by the independent commission established in subsection (f), and such rules shall include disclosure of secondary sources of income.

(2) Persons holding statewide elective offices shall also file disclosure of their financial interests pursuant to subsection (h)(1).

(3) The independent commission provided for in subsection (f) shall mean the Florida Commission on Ethics.

**History.**—Proposed by Initiative Petition filed with the Secretary of State July 29, 1976; adopted 1976.

**SECTION 9. English is the official language of Florida.—**

(a) English is the official language of the State of Florida.

(b) The legislature shall have the power to enforce this section by appropriate legislation.

**History.**—Proposed by Initiative Petition filed with the Secretary of State August 8, 1988; adopted 1988.

**ARTICLE III**

**LEGISLATURE**

Sec.

1. Composition.
2. Members; officers.
3. Sessions of the legislature.
4. Quorum and procedure.
5. Investigations; witnesses.
6. Laws.
7. Passage of bills.
8. Executive approval and veto.
9. Effective dates of laws.
10. Special laws.
11. Prohibited special laws.
12. Appropriation bills.
13. Term of office.
14. Civil service system.
15. Terms and qualifications of legislators.
16. Legislative apportionment.
17. Impeachment.
18. Conflict of interest.
19. State Budgeting, Planning and Appropriations Processes.

**SECTION 1. Composition.**—The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district.

**SECTION 2. Members; officers.**—Each house shall be the sole judge of the qualifications, elections, and returns of its members, and shall biennially choose its officers, including a permanent presiding officer selected from its membership, who shall be designated in the senate as President of the Senate, and in the house as Speaker of the House of Representatives. The senate shall designate a Secretary to serve at its pleasure, and the house of representatives shall designate a Clerk to serve at its pleasure. The legislature shall appoint an auditor to serve at its pleasure who shall audit public records and perform related duties as prescribed by law or concurrent resolution.

**SECTION 3. Sessions of the legislature.—**

(a) **ORGANIZATION SESSIONS.** On the fourteenth day following each general election the legislature shall convene for the exclusive purpose of organization and selection of officers.

(b) **REGULAR SESSIONS.** In 1991, a regular session of the legislature shall convene on the first Tuesday after the first Monday in March. In 1992 and thereafter, a regular session of the legislature shall convene on the first Tuesday after the first Monday in February of each odd-numbered year, and on the first Tuesday after the first Monday in February, or such other date as may be fixed by law, of each even-numbered year.

(c) **SPECIAL SESSIONS.**

(1) The governor, by proclamation stating the purpose, may convene the legislature in special session during which only such legislative business may be transacted as is within the purview of the proclamation, or of a communication from the governor, or is introduced by consent of two-thirds of the membership of each house.

(2) A special session of the legislature may be convened as provided by law.

(d) **LENGTH OF SESSIONS.** A regular session of the legislature shall not exceed sixty consecutive days, and a special session shall not exceed twenty consecutive days, unless extended beyond such limit by a three-fifths vote of each house. During such an extension no new business may be taken up in either house without the consent of two-thirds of its membership.

(e) **ADJOURNMENT.** Neither house shall adjourn for more than seventy-two consecutive hours except pursuant to concurrent resolution.

(f) **ADJOURNMENT BY GOVERNOR.** If, during any regular or special session, the two houses cannot agree upon a time for adjournment, the governor may adjourn the session sine die or to any date within the



period authorized for such session; provided that, at least twenty-four hours before adjourning the session, he shall, while neither house is in recess, give each house formal written notice of his intention to do so, and agreement reached within that period by both houses on a time for adjournment shall prevail.

*History.*—Am. C.S. for S.J.R. 380, 1989; adopted 1990.

#### **SECTION 4. Quorum and procedure.—**

(a) A majority of the membership of each house shall constitute a quorum, but a smaller number may adjourn from day to day and compel the presence of absent members in such manner and under such penalties as it may prescribe. Each house shall determine its rules of procedure.

(b) Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed.

(c) Each house shall keep and publish a journal of its proceedings; and upon the request of five members present, the vote of each member voting on any question shall be entered on the journal. In any legislative committee or subcommittee, the vote of each member voting on the final passage of any legislation pending before the committee, and upon the request of any two members of the committee or subcommittee, the vote of each member on any other question, shall be recorded.

(d) Each house may punish a member for contempt or disorderly conduct and, by a two-thirds vote of its membership, may expel a member.

(e) The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house, and joint conference committee meetings, shall be open and noticed to the public. The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public. All open meetings shall be subject to order and decorum. This section shall be implemented and defined by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to protect a witness appearing before a committee, provide for the closure of committee meetings. Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

*History.*—Am. S.J.R.'s 1990, 2, 1990; adopted 1990.

**SECTION 5. Investigations; witnesses.**—Each house, when in session, may compel attendance of witnesses and production of documents and other evidence upon any matter under investigation before it or any of its committees, and may punish by fine not exceeding one thousand dollars or imprisonment not exceeding ninety days, or both, any person not a member who has been guilty of disorderly or contemptuous conduct in its presence or has refused to obey its lawful summons or to answer lawful questions. Such powers, except the power to punish, may be conferred by law upon committees when the legislature is not in session. Punishment of contempt of an interim legislative committee shall be by judicial proceedings as prescribed by law.

**SECTION 6. Laws.**—Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: “Be It Enacted by the Legislature of the State of Florida:”.

**SECTION 7. Passage of bills.**—Any bill may originate in either house and after passage in one may be amended in the other. It shall be read in each house on three separate days, unless this rule is waived by two-thirds vote; provided the publication of its title in the journal of a house shall satisfy the requirement for the first reading in that house. On each reading, it shall be read by title only, unless one-third of the members present desire it read in full. On final passage, the vote of each member voting shall be entered on the journal. Passage of a bill shall require a majority vote in each house. Each bill and joint resolution passed in both houses shall be signed by the presiding officers of the respective houses and by the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment sine die.

**History.**—Am. S.J.R. 1349, 1980; adopted 1980.

**SECTION 8. Executive approval and veto.**—

(a) Every bill passed by the legislature shall be presented to the governor for his approval and shall become a law if he approves and signs it, or fails to veto it within seven consecutive days after presentation. If during that period or on the seventh day the legislature adjourns sine die or takes a recess of more than thirty days, he shall have fifteen consecutive days from the date of presentation to act on the bill. In all cases except

general appropriation bills, the veto shall extend to the entire bill. The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.

(b) When a bill or any specific appropriation of a general appropriation bill has been vetoed by the governor, he shall transmit his signed objections thereto to the house in which the bill originated if in session. If that house is not in session, he shall file them with the secretary of state, who shall lay them before that house at its next regular or special session, and they shall be entered on its journal.

(c) If each house shall, by a two-thirds vote, re-enact the bill or reinstate the vetoed specific appropriation of a general appropriation bill, the vote of each member voting shall be entered on the respective journals, and the bill shall become law or the specific appropriation reinstated, the veto notwithstanding.

**SECTION 9. Effective date of laws.**—Each law shall take effect on the sixtieth day after adjournment sine die of the session of the legislature in which enacted or as otherwise provided therein. If the law is passed over the veto of the governor it shall take effect on the sixtieth day after adjournment sine die of the session in which the veto is overridden, on a later date fixed in the law, or on a date fixed by resolution passed by both houses of the legislature.

**SECTION 10. Special laws.**—No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. Such notice shall not be necessary when the law, except the provision for referendum, is conditioned to become effective only upon approval by vote of the electors of the area affected.

**SECTION 11. Prohibited special laws.**—

(a) There shall be no special law or general law of local application pertaining to:

(1) election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts or local governmental agencies;

(2) assessment or collection of taxes for state or county purposes, including extension of time therefor, relief of tax officers from due performance of their duties, and relief of their sureties from liability;

(3) rules of evidence in any court;

(4) punishment for crime;

(5) petit juries, including compensation of jurors, except establishment of jury commissions;

(6) change of civil or criminal venue;

(7) conditions precedent to bringing any civil or criminal proceedings, or limitations of time therefor;

(8) refund of money legally paid or remission of fines, penalties or forfeitures;

(9) creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts;

(10) disposal of public property, including any interest therein, for private purposes;

(11) vacation of roads;

(12) private incorporation or grant of privilege to a private corporation;

(13) effectuation of invalid deeds, wills or other instruments, or change in the law of descent;

(14) change of name of any person;

(15) divorce;

(16) legitimation or adoption of persons;

(17) relief of minors from legal disabilities;

(18) transfer of any property interest of persons under legal disabilities or of estates of decedents;

(19) hunting or fresh water fishing;

(20) regulation of occupations which are regulated by a state agency;

or

<sup>1</sup>(21) any subject when prohibited by general law passed by a three-fifths vote of the membership of each house. Such law may be amended or repealed by like vote.

(b) In the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law.

<sup>1</sup>Note.—See the following for prohibited subject matters added under the authority of this paragraph:

s. 112.67, F.S. (Pertaining to protection of public employee retirement benefits).

s. 121.191, F.S. (Pertaining to state-administered or supported retirement systems).

s. 145.16, F.S. (Pertaining to compensation of designated county officials).

s. 189.404(2), F.S. (Pertaining to independent special districts).

s. 190.049, F.S. (Pertaining to the creation of independent special districts having the powers enumerated in two or more of the paragraphs of s. 190.012, F.S.).

s. 215.845, F.S. (Pertaining to the maximum rate of interest on bonds).

s. 235.26(10), F.S. (Pertaining to the "State Uniform Building Code for Public Educational Facilities Construction").

s. 236.014, F.S. (Pertaining to taxation for school purposes and the Florida Education Finance Program).

- s. 298.76(1), F.S. (Pertaining to the grant of authority, power, rights, or privileges to a water control district formed pursuant to ch. 298, F.S.).
- s. 370.083, F.S. (Pertaining to the sale or purchase of speckled sea trout or weakfish).
- s. 370.172(4), F.S. (Pertaining to spearfishing in salt waters and saltwater tributaries).
- s. 373.503(2)(b), F.S. (Pertaining to allocation of millage for water management purposes).

**SECTION 12. Appropriation bills.**—Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.

**SECTION 13. Term of office.**—No office shall be created the term of which shall exceed four years except as provided herein.

**SECTION 14. Civil service system.**—By law there shall be created a civil service system for state employees, except those expressly exempted, and there may be created civil service systems and boards for county, district or municipal employees and for such offices thereof as are not elected or appointed by the governor, and there may be authorized such boards as are necessary to prescribe the qualifications, method of selection and tenure of such employees and officers.

**SECTION 15. Terms and qualifications of legislators.**—

(a) **SENATORS.** Senators shall be elected for terms of four years, those from odd-numbered districts in the years the numbers of which are multiples of four and those from even-numbered districts in even-numbered years the numbers of which are not multiples of four; except, at the election next following a reapportionment, some senators shall be elected for terms of two years when necessary to maintain staggered terms.

(b) **REPRESENTATIVES.** Members of the house of representatives shall be elected for terms of two years in each even-numbered year.

(c) **QUALIFICATIONS.** Each legislator shall be at least twenty-one years of age, an elector and resident of the district from which elected and shall have resided in the state for a period of two years prior to election.

(d) **ASSUMING OFFICE; VACANCIES.** Members of the legislature shall take office upon election. Vacancies in legislative office shall be filled only by election as provided by law.

**SECTION 16. Legislative apportionment.**—

(a) **SENATORIAL AND REPRESENTATIVE DISTRICTS.** The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor

more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.

(b) **FAILURE OF LEGISLATURE TO APPORTION; JUDICIAL REAPPORTIONMENT.** In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, the attorney general shall, within five days, petition the supreme court of the state to make such apportionment. No later than the sixtieth day after the filing of such petition, the supreme court shall file with the secretary of state an order making such apportionment.

(c) **JUDICIAL REVIEW OF APPORTIONMENT.** Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) **EFFECT OF JUDGMENT IN APPORTIONMENT; EXTRAORDINARY APPORTIONMENT SESSION.** A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.

(e) **EXTRAORDINARY APPORTIONMENT SESSION; REVIEW OF APPORTIONMENT.** Within fifteen days after the adjournment of an extraordinary apportionment session, the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment shall be had as provided for in cases of such joint resolution adopted at a regular or special apportionment session.

(f) **JUDICIAL REAPPORTIONMENT.** Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court determine that the apportionment made is invalid, the court shall, not later than sixty days after receiving the petition of the attorney general, file with the secretary of state an order making such apportionment.

**SECTION 17. Impeachment.—**

(a) The governor, lieutenant governor, members of the cabinet, justices of the supreme court, judges of district courts of appeal, judges of circuit courts, and judges of county courts shall be liable to impeachment for misdemeanor in office. The house of representatives by two-thirds vote shall have the power to impeach an officer. The speaker of the house of representatives shall have power at any time to appoint a committee to investigate charges against any officer subject to impeachment.

(b) An officer impeached by the house of representatives shall be disqualified from performing any official duties until acquitted by the senate, and unless the governor is impeached he may by appointment fill the office until completion of the trial.

(c) All impeachments by the house of representatives shall be tried by the senate. The chief justice of the supreme court, or another justice designated by him, shall preside at the trial, except in a trial of the chief justice, in which case the governor shall preside. The senate shall determine the time for the trial of any impeachment and may sit for the trial whether the house of representatives be in session or not. The time fixed for trial shall not be more than six months after the impeachment. During an impeachment trial senators shall be upon their oath or affirmation. No officer shall be convicted without the concurrence of two-thirds of the members of the senate present. Judgment of conviction in cases of impeachment shall remove the offender from office and, in the discretion of the senate, may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility of the officer.

*History.*—Am. S.J.R. 459, 1987; adopted 1988.

**SECTION 18. Conflict of interest.**—A code of ethics for all state employees and nonjudicial officers prohibiting conflict between public duty and private interests shall be prescribed by law.

**SECTION 19. State Budgeting, Planning and Appropriations Processes.**—

(a) **ANNUAL BUDGETING.** Effective July 1, 1994, general law shall prescribe the adoption of annual state budgetary and planning processes and require that detail reflecting the annualized costs of the state budget and reflecting the nonrecurring costs of the budget requests shall accompany state department and agency legislative budget requests, the governor's recommended budget, and appropriation bills. For purposes of this subsection, the terms department and agency shall include the judicial branch.

(b) **APPROPRIATION BILLS FORMAT.** Separate sections within the general appropriation bill shall be used for each major program area of the state budget; major program areas shall include: education enhancement "lottery" trust fund items; education (all other funds); human services; criminal justice and corrections; natural resources, environment, growth management, and transportation; general government; and judicial branch. Each major program area shall include an itemization of expenditures for: state operations; state capital outlay; aid to local governments and nonprofit organizations operations; aid to local governments and nonprofit organizations capital outlay; federal funds and the associated state matching funds; spending authorizations for operations; and spending authorizations for capital outlay. Additionally, appropriation bills passed by the legislature shall include an itemization of specific appropriations that exceed one million dollars (\$1,000,000.00) in 1992 dollars. For purposes of this subsection, "specific appropriation," "itemization," and "major program area" shall be defined by law. This itemization threshold shall be adjusted by general law every four years to reflect the rate of inflation or deflation as indicated in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items, or successor reports as reported by the United States Department of Labor, Bureau of Labor Statistics or its successor. Substantive bills containing appropriations shall also be subject to the itemization requirement mandated under this provision and shall be subject to the governor's specific appropriation veto power described in Article III, Section 8. This subsection shall be effective July 1, 1994.

(c) **APPROPRIATIONS REVIEW PROCESS.** Effective July 1, 1993, general law shall prescribe requirements for each department and agency of state government to submit a planning document and supporting budget request for review by the appropriations committees of both houses of the legislature. The review shall include a comparison of the major issues in the planning document and budget requests to those major issues included in the governor's recommended budget. For purposes of this subsection, the terms department and agency shall include the judicial branch.

(d) **SEVENTY-TWO HOUR PUBLIC REVIEW PERIOD.**



Effective November 4, 1992, all general appropriation bills shall be furnished to each member of the legislature, each member of the cabinet, the governor, and the chief justice of the supreme court at least seventytwo hours before final passage thereof, by either house of the legislature.

(e) **FINAL BUDGET REPORT.** Effective November 4, 1992, a final budget report shall be prepared as prescribed by general law. The final budget report shall be produced no later than the 90th day after the beginning of the fiscal year, and copies of the report shall be furnished to each member of the legislature, the head of each department and agency of the state, the auditor general, and the chief justice of the supreme court.

(f) **TRUST FUNDS.**

(1) No trust fund of the State of Florida or other public body may be created by law without a three-fifths ( $\frac{3}{5}$ ) vote of the membership of each house of the legislature in a separate bill for that purpose only.

(2) State trust funds in existence before the effective date of this subsection shall terminate not more than four years after the effective date of this subsection. State trust funds created after the effective date of this subsection shall terminate not more than four years after the effective date of the act authorizing the creation of the trust fund. By law the legislature may set a shorter time period for which any trust fund is authorized.

(3) Trust funds required by federal programs or mandates; trust funds established for bond covenants, indentures, or resolutions, whose revenues are legally pledged by the state or public body to meet debt service or other financial requirements of any debt obligations of the state or any public body; the state transportation trust fund; the trust fund containing the net annual proceeds from the Florida Education Lotteries; the Florida retirement trust fund; trust funds for institutions under the management of the Board of Regents, where such trust funds are for auxiliary enterprises and contracts, grants, and donations, as those terms are defined by general law; trust funds that serve as clearing funds or accounts for the comptroller or state agencies; trust funds that account for assets held by the state in a trustee capacity as an agent or fiduciary for individuals, private organizations, or other governmental units; and other trust funds authorized by this Constitution, are not subject to the requirements set forth in paragraph (2) of this subsection.

(4) All cash balances and income of any trust funds abolished under this subsection shall be deposited into the general revenue fund.

(5) The provisions of this subsection shall be effective November 4, 1992.

(g) **BUDGET STABILIZATION FUND.** Beginning with the 1994-1995 fiscal year, at least 1% of an amount equal to the last completed fiscal

year's net revenue collections for the general revenue fund shall be retained in a budget stabilization fund. The budget stabilization fund shall be increased to at least 2% of said amount for the 1995-1996 fiscal year, at least 3% of said amount for the 1996-1997 fiscal year, at least 4% of said amount for the 1997-1998 fiscal year, and at least 5% of said amount for the 1998-1999 fiscal year. Subject to the provisions of this subsection, the budget stabilization fund shall be maintained at an amount equal to at least 5% of the last completed fiscal year's net revenue collections for the general revenue fund. The budget stabilization fund's principal balance shall not exceed an amount equal to 10% of the last completed fiscal year's net revenue collections for the general revenue fund. The legislature shall provide criteria for withdrawing funds from the budget stabilization fund in a separate bill for that purpose only and only for the purpose of covering revenue shortfalls of the general revenue fund or for the purpose of providing funding for an emergency, as defined by general law. General law shall provide for the restoration of this fund. The budget stabilization fund shall be comprised of funds not otherwise obligated or committed for any purpose.

(h) STATE PLANNING DOCUMENT AND DEPARTMENT AND AGENCY PLANNING DOCUMENT PROCESSES. The governor shall recommend to the legislature biennially any revisions to the state planning document, as defined by law. General law shall require a biennial review and revision of the state planning document, shall require the governor to report to the legislature on the progress in achieving the state planning document's goals, and shall require all departments and agencies of state government to develop planning documents consistent with the state planning document. The state planning document and department and agency planning documents shall remain subject to review and revision by the legislature. The department and agency planning documents shall include a prioritized listing of planned expenditures for review and possible reduction in the event of revenue shortfalls, as defined by general law. To ensure productivity and efficiency in the executive, legislative, and judicial branches, a quality management and accountability program shall be implemented by general law. For the purposes of this subsection, the terms department and agency shall include the judicial branch. This subsection shall be effective July 1, 1993.

**History.**—Proposed by Taxation and Budget Reform Commission, Revision No. 1, 1992, filed with the Secretary of State May 7, 1992; adopted 1992.

## **ARTICLE IV**

### **EXECUTIVE**

#### **Sec.**

1. Governor.
2. Lieutenant governor.
3. Succession to office of governor; acting governor.
4. Cabinet.
5. Election of governor, lieutenant governor and cabinet members; qualifications; terms.
6. Executive departments.
7. Suspensions; filling office during suspensions.
8. Clemency.
9. Game and fresh water fish commission.
10. Attorney General.
11. Department of Veterans Affairs.
12. Department of Elderly Affairs.
13. Revenue Shortfalls.

#### **SECTION 1. Governor.—**

(a) The supreme executive power shall be vested in a governor. He shall be commander-in-chief of all military forces of the state not in active service of the United States. He shall take care that the laws be faithfully executed, commission all officers of the state and counties, and transact all necessary business with the officers of government. He may require information in writing from all executive or administrative state, county or municipal officers upon any subject relating to the duties of their respective offices. The governor shall be the chief administrative officer of the state responsible for the planning and budgeting for the state.

(b) The governor may initiate judicial proceedings in the name of the state against any executive or administrative state, county or municipal officer to enforce compliance with any duty or restrain any unauthorized act.

(c) The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.

(d) The governor shall have power to call out the militia to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion.

(e) The governor shall by message at least once in each regular session inform the legislature concerning the condition of the state, propose such reorganization of the executive department as will promote efficiency and economy, and recommend measures in the public interest.

(f) When not otherwise provided for in this constitution, the governor shall fill by appointment any vacancy in state or county office for the remainder of the term of an appointive office, and for the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election.

**History.**—Am. proposed by Taxation and Budget Reform Commission, Revision No. 1, 1992, filed with the Secretary of State May 7, 1992; adopted 1992.

**SECTION 2. Lieutenant governor.**—There shall be a lieutenant governor. He shall perform such duties pertaining to the office of governor as shall be assigned to him by the governor, except when otherwise provided by law, and such other duties as may be prescribed by law.

**SECTION 3. Succession to office of governor; acting governor.**—

(a) Upon vacancy in the office of governor, the lieutenant governor shall become governor. Further succession to the office of governor shall be prescribed by law. A successor shall serve for the remainder of the term.

(b) Upon impeachment of the governor and until completion of trial thereof, or during his physical or mental incapacity, the lieutenant governor shall act as governor. Further succession as acting governor shall be prescribed by law. Incapacity to serve as governor may be determined by the supreme court upon due notice after docketing of a written suggestion thereof by four cabinet members, and in such case restoration of capacity shall be similarly determined after docketing of written suggestion thereof by the governor, the legislature or four cabinet members. Incapacity to serve as governor may also be established by certificate filed with the secretary of state by the governor declaring his incapacity for physical reasons to serve as governor, and in such case restoration of capacity shall be similarly established.

**SECTION 4. Cabinet.**—

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties

specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.

(c) The attorney general shall be the chief state legal officer. There is created in the office of the attorney general the position of statewide prosecutor. The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is affecting or has affected two or more judicial circuits as provided by general law. The statewide prosecutor shall be appointed by the attorney general from not less than three persons nominated by the judicial nominating commission for the supreme court, or as otherwise provided by general law.

(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.

(e) The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller. Such order may be in any form and may require the disbursement of state funds by electronic means or by means of a magnetic tape or any other transfer medium.

(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.

(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.

*History.*—Am. H.J.R. 435, 1983; adopted 1984; Am. H.J.R. 386, 1985; adopted 1986.

#### **SECTION 5. Election of governor, lieutenant governor and cabinet members; qualifications; terms.—**

(a) At a state-wide general election in each calendar year the number of which is even but not a multiple of four, the electors shall choose a governor and a lieutenant governor and members of the cabinet each for a term of four years beginning on the first Tuesday after the first Monday in January of the succeeding year. In the general election and in party primaries, if held, all candidates for the offices of governor and lieutenant governor shall form joint candidacies in a manner prescribed by law so that each voter shall cast a single vote for a candidate for governor and a candidate for lieutenant governor running together.

(b) When elected, the governor, lieutenant governor and each cabinet member must be an elector not less than thirty years of age who has resided in the state for the preceding seven years. The attorney general must have

been a member of the bar of Florida for the preceding five years. No person who has, or but for resignation would have, served as governor or acting governor for more than six years in two consecutive terms shall be elected governor for the succeeding term.

**SECTION 6. Executive departments.**—All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, except:

(a) When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office.

(b) Boards authorized to grant and revoke licenses to engage in regulated occupations shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause.

**SECTION 7. Suspensions; filling office during suspensions.**—

(a) By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor.

(b) The senate may, in proceedings prescribed by law, remove from office or reinstate the suspended official and for such purpose the senate may be convened in special session by its president or by a majority of its membership.

(c) By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter.

**SECTION 8. Clemency.**—

(a) Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary

of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

(b) In cases of treason the governor may grant reprieves until adjournment of the regular session of the legislature convening next after the conviction, at which session the legislature may grant a pardon or further reprieve; otherwise the sentence shall be executed.

(c) There may be created by law a parole and probation commission with power to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime. The qualifications, method of selection and terms, not to exceed six years, of members of the commission shall be prescribed by law.

**SECTION 9. Game and fresh water fish commission.**—There shall be a game and fresh water fish commission, composed of five members appointed by the governor subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, except that all license fees for taking wild animal life and fresh water aquatic life and penalties for violating regulations of the commission shall be prescribed by specific statute. The legislature may enact laws in aid of the commission, not inconsistent with this section. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from such license fees shall be appropriated to the commission by the legislature for the purpose of management, protection and conservation of wild animal life and fresh water aquatic life.

*History.*—Am. C.S. for H.J.R. 637, 1973; adopted 1974.

**SECTION 10. Attorney General.**—The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously.

*History.*—Added, H.J.R. 71, 1986; adopted 1986.

**SECTION 11. Department of Veterans Affairs.**—The legislature, by general law, may provide for the establishment of the Department of Veterans Affairs.

**History.**—Added, C.S. for H.J.R. 290, 1988; adopted 1988.

**SECTION 12. Department of Elderly Affairs.**—The legislature may create a Department of Elderly Affairs and prescribe its duties. The provisions governing the administration of the department must comply with Section 6 of Article IV of the State Constitution.

**History.**—Added, C.S. for H.J.R. 290, 1988; adopted 1988.

**SECTION 13. Revenue Shortfalls.**—In the event of revenue shortfalls, as defined by general law, the governor and cabinet may establish all necessary reductions in the state budget in order to comply with the provisions of Article VII, Section 1(d). The governor and cabinet shall implement all necessary reductions for the executive budget, the chief justice of the supreme court shall implement all necessary reductions for the judicial budget, and the speaker of the house of representatives and the president of the senate shall implement all necessary reductions for the legislative budget. Budget reductions pursuant to this section shall be consistent with the provisions of Article III, Section 19(h).

**History.**—Proposed by Taxation and Budget Reform Commission Revision No. 1, 1992, filed with the Secretary of State May 7, 1992; adopted 1992.

## ARTICLE V

### JUDICIARY

#### Sec.

1. Courts.
2. Administration; practice and procedure.
3. Supreme court.
4. District courts of appeal.
5. Circuit courts.
6. County courts.
7. Specialized divisions.
8. Eligibility.
9. Determination of number of judges.
10. Retention; elections and terms.
11. Vacancies.
12. Discipline; removal and retirement.
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14. Judicial salaries.
15. Attorneys; admission and discipline.
16. Clerks of the circuit courts.
17. State attorneys.
18. Public defenders.
19. Judicial officers as conservators of the peace.
20. Schedule to Article V.

**SECTION 1. Courts.**—The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality. The legislature shall, by general law, divide the state into appellate court districts and judicial circuits following county lines. Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices. The legislature may establish by general law a civil traffic hearing officer system for the purpose of hearing civil traffic infractions.

*History.*—S.J.R. 52-D, 1971; adopted 1972; Am. H.J.R. 1608, 1988; adopted 1988.

**SECTION 2. Administration; practice and procedure.**—

(a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

(b) The chief justice of the supreme court shall be chosen by a majority of the members of the court. He shall be the chief administrative officer of the judicial system. He shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in his respective circuit.

(c) A chief judge for each district court of appeal shall be chosen by a majority of the judges thereof or, if there is no majority, by the chief justice. The chief judge shall be responsible for the administrative supervision of the court.

(d) A chief judge in each circuit shall be chosen from among the circuit judges as provided by supreme court rule. The chief judge shall be

responsible for the administrative supervision of the circuit courts and county courts in his circuit.

*History.*—S.J.R. 52-D, 1971; adopted 1972.

### **SECTION 3. Supreme court.—**

(a) **ORGANIZATION.**—The supreme court shall consist of seven justices. Of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of his original appointment or election. Five justices shall constitute a quorum. The concurrence of four justices shall be necessary to a decision. When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.

(b) **JURISDICTION.**—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to

the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

(c) **CLERK AND MARSHAL.**—The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by general law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

**History.**—S.J.R. 52-D, 1971; adopted 1972; Am. C.S. for S.J.R.'s 49, 81, 1976; adopted 1976; Am. S.J.R. 20-C, 1979; adopted 1980; Am. H.J.R. 71, 1986; adopted 1986.

#### **SECTION 4. District courts of appeal.—**

(a) **ORGANIZATION.**—There shall be a district court of appeal serving each appellate district. Each district court of appeal shall consist of at least three judges. Three judges shall consider each case and the concurrence of two shall be necessary to a decision.

(b) **JURISDICTION.**—

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

(2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.

(3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

(c) **CLERKS AND MARSHALS.**—Each district court of appeal shall

appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by general law. The marshal shall have the power to execute the process of the court throughout the territorial jurisdiction of the court, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

#### **SECTION 5. Circuit courts.—**

(a) **ORGANIZATION.**—There shall be a circuit court serving each judicial circuit.

(b) **JURISDICTION.**—The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

#### **SECTION 6. County courts.—**

(a) **ORGANIZATION.**—There shall be a county court in each county. There shall be one or more judges for each county court as prescribed by general law.

(b) **JURISDICTION.**—The county courts shall exercise the jurisdiction prescribed by general law. Such jurisdiction shall be uniform throughout the state.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 7. Specialized divisions.**—All courts except the supreme court may sit in divisions as may be established by general law. A circuit or county court may hold civil and criminal trials and hearings in any place within the territorial jurisdiction of the court as designated by the chief judge of the circuit.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 8. Eligibility.**—No person shall be eligible for office of justice or judge of any court unless he is an elector of the state and resides in the territorial jurisdiction of his court. No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which he has served. No person is eligible for

the office of justice of the supreme court or judge of a district court of appeal unless he is, and has been for the preceding ten years, a member of the bar of Florida. No person is eligible for the office of circuit judge unless he is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, no person is eligible for the office of county court judge unless he is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less if he is a member in good standing of the bar of Florida.

**History.**—S.J.R. 52-D, 1971; adopted 1972; Am. H.J.R. 37, 1984; adopted 1984 (effective July 1, 1985).

**SECTION 9. Determination of number of judges.**—The supreme court shall establish by rule uniform criteria for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits. If the supreme court finds that a need exists for increasing or decreasing the number of judges or increasing, decreasing or redefining appellate districts and judicial circuits, it shall, prior to the next regular session of the legislature, certify to the legislature its findings and recommendations concerning such need. Upon receipt of such certificate, the legislature, at the next regular session, shall consider the findings and recommendations and may reject the recommendations or by law implement the recommendations in whole or in part; provided the legislature may create more judicial offices than are recommended by the supreme court or may decrease the number of judicial offices by a greater number than recommended by the court only upon a finding of two-thirds of the membership of both houses of the legislature, that such a need exists. A decrease in the number of judges shall be effective only after the expiration of a term. If the supreme court fails to make findings as provided above when need exists, the legislature may by concurrent resolution request the court to certify its findings and recommendations and upon the failure of the court to certify its findings for nine consecutive months, the legislature may, upon a finding of two-thirds of the membership of both houses of the legislature that a need exists, increase or decrease the number of judges or increase, decrease or redefine appellate districts and judicial circuits.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 10. Retention; election and terms.**—

(a) Any justice of the supreme court or any judge of a district court

of appeal may qualify for retention by a vote of the electors in the general election next preceding the expiration of his term in the manner prescribed by law. If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. When a justice of the supreme court or a judge of a district court of appeal so qualifies, the ballot shall read substantially as follows: "Shall Justice (or Judge) (name of justice or judge) of the (name of the court) be retained in office?" If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to retain, the justice or judge shall be retained for a term of six years commencing on the first Tuesday after the first Monday in January following the general election. If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.

(b) Circuit judges and judges of county courts shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts. The terms of circuit judges shall be for six years. The terms of judges of county courts shall be for four years.

History.—S.J.R. 52-D, 1971; adopted 1972; Am. C.S. for S.J.R.'s 49, 81, 1976; adopted 1976.

#### **SECTION 11. Vacancies.—**

(a) The governor shall fill each vacancy on the supreme court or on a district court of appeal by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment, one of three persons nominated by the appropriate judicial nominating commission.

(b) The governor shall fill each vacancy on a circuit court or on a county court by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election, one of not fewer than three persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

(c) The nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor shall make the appointment within sixty days after the nominations have been certified to him.

(d) There shall be a separate judicial nominating commission as provided by general law for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within the circuit. Uniform rules

of procedure shall be established by the judicial nominating commissions at each level of the court system. Such rules, or any part thereof, may be repealed by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring. Except for deliberations of the judicial nominating commissions, the proceedings of the commissions and their records shall be open to the public.

**History.**—S.J.R. 52-D, 1971; adopted 1972; Am. C.S. for S.J.R.'s 49, 81, 1976; adopted 1976; Am. H.J.R. 1160, 1984; adopted 1984.

## **SECTION 12. Discipline; removal and retirement.—**

(a) There shall be a judicial qualifications commission vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966, (without regard to the effective date of this section) demonstrates a present unfitness to hold office, and to investigate and recommend the reprimand of a justice or judge whose conduct, during term of office or otherwise occurring on or after November 1, 1966 (without regard to the effective date of this section), warrants such a reprimand. The commission shall be composed of:

(1) Two judges of district courts of appeal selected by the judges of those courts, two circuit judges selected by the judges of the circuit courts and two judges of county courts selected by the judges of those courts;

(2) Two electors who reside in the state, who are members of the bar of Florida, and who shall be chosen by the governing body of the bar of Florida; and

(3) Five electors who reside in the state, who have never held judicial office or been members of the bar of Florida, and who shall be appointed by the governor.

(b) The members of the judicial qualifications commission shall serve staggered terms, not to exceed six years, as prescribed by general law. No member of the commission except a justice or judge shall be eligible for state judicial office so long as he is a member of the commission and for a period of two years thereafter. No member of the commission shall hold office in a political party or participate in any campaign for judicial office or hold public office; provided that a judge may participate in his own campaign for judicial office and hold that office. The commission shall elect one of its members as its chairman.

(c) Members of the judicial qualifications commission not subject to impeachment shall be subject to removal from the commission pursuant to the provisions of Article IV, Section 7, Florida Constitution.

(d) The commission shall adopt rules regulating its proceedings, the filling of vacancies by the appointing authorities, the disqualification of members, and the temporary replacement of disqualified or incapacitated members. The commission's rules, or any part thereof, may be repealed by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring. Until formal charges against a justice or judge are filed by the commission with the clerk of the supreme court of Florida all proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause and the filing by the commission with said clerk of such formal charges against a justice or judge such charges and all further proceedings before the commission shall be public. The commission may with seven members concurring recommend to the supreme court the temporary suspension of any justice or judge against whom formal charges are pending.

(e) The commission shall have access to all information from all executive, legislative and judicial agencies, including grand juries, subject to the rules of the commission. At any time, on request of the speaker of the house of representatives or the governor, the commission shall make available all information in the possession of the commission for use in consideration of impeachment or suspension, respectively.

(f) Upon recommendation of two-thirds of the members of the judicial qualifications commission, the supreme court may order that the justice or judge be disciplined by appropriate reprimand, or be removed from office with termination of compensation for willful or persistent failure to perform his duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office, or be involuntarily retired for any permanent disability that seriously interferes with the performance of his duties. Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office. After the filing of a formal proceeding and upon request of the commission, the supreme court may suspend the justice or judge from office, with or without compensation, pending final determination of the inquiry.

(g) The power of removal conferred by this section shall be both alternative and cumulative to the power of impeachment and to the power of suspension by the governor and removal by the senate.

(h) Notwithstanding any of the foregoing provisions of this section, if the person who is the subject of proceedings by the judicial qualifications commission is a justice of the supreme court of Florida all justices of such court automatically shall be disqualified to sit as justices of such court with



respect to all proceedings therein concerning such person and the supreme court for such purposes shall be composed of a panel consisting of the seven chief judges of the judicial circuits of the state of Florida most senior in tenure of judicial office as circuit judge. For purposes of determining seniority of such circuit judges in the event there be judges of equal tenure in judicial office as circuit judge the judge or judges from the lower numbered circuit or circuits shall be deemed senior. In the event any such chief circuit judge is under investigation by the judicial qualifications commission or is otherwise disqualified or unable to serve on the panel, the next most senior chief circuit judge or judges shall serve in place of such disqualified or disabled chief circuit judge.

(i) **SCHEDULE TO SECTION 12.—**

(1) The terms of office of the present members of the judicial qualifications commission shall expire on January 1, 1975 and new members shall be appointed to serve the following staggered terms:

a. **Group I.**—The terms of five members, composed of two electors as set forth in s. 12(a)(3) of Article V, one member of the bar of Florida as set forth in s. 12(a)(2) of Article V, one judge from the district courts of appeal and one circuit judge as set forth in s. 12(a)(1) of Article V, shall expire on December 31, 1976.

b. **Group II.**—The terms of four members, composed of one elector as set forth in s. 12(a)(3) of Article V, one member of the bar of Florida as set forth in s. 12(a)(2) of Article V, one circuit judge and one county judge as set forth in s. 12(a)(1) of Article V shall expire on December 31, 1978.

c. **Group III.**—The terms of four members, composed of two electors as set forth in s. 12(a)(3) of Article V, one judge from the district courts of appeal and one county judge as set forth in s. 12(a)(1) of Article V, shall expire on December 31, 1980.

(2) The 1976 amendment to section 12 of Article V, if submitted at a special election, shall take effect upon approval by the electors of Florida.

**History.**—S.J.R. 52-D, 1971; adopted 1972; Am. H.J.R. 3911, 1974; adopted 1974; Am. H.J.R. 1709, 1975; adopted 1976.

**SECTION 13. Prohibited activities.**—All justices and judges shall devote full time to their judicial duties. They shall not engage in the practice of law or hold office in any political party.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 14. Judicial salaries.**—All justices and judges shall be compensated only by state salaries fixed by general law. The judiciary shall have no power to fix appropriations.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 15. Attorneys; admission and discipline.**—The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 16. Clerks of the circuit courts.**—There shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII section 1. Notwithstanding any other provision of the constitution, the duties of the clerk of the circuit court may be divided by special or general law between two officers, one serving as clerk of court and one serving as ex officio clerk of the board of county commissioners, auditor, recorder, and custodian of all county funds. There may be a clerk of the county court if authorized by general or special law.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 17. State attorneys.**—In each judicial circuit a state attorney shall be elected for a term of four years. Except as otherwise provided in this constitution, he shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law; provided, however, when authorized by general law, the violations of all municipal ordinances may be prosecuted by municipal prosecutors. A state attorney shall be an elector of the state and reside in the territorial jurisdiction of the circuit. He shall be and have been a member of the bar of Florida for the preceding five years. He shall devote full time to his duties, and he shall not engage in the private practice of law. State attorneys shall appoint such assistant state attorneys as may be authorized by law.

**History.**—S.J.R. 52-D, 1971; adopted 1972; Am. H.J.R. 386, 1985; adopted 1986.

**SECTION 18. Public defenders.**—In each judicial circuit a public defender shall be elected for a term of four years. He shall perform duties prescribed by general law. A public defender shall be an elector of the state and reside in the territorial jurisdiction of the circuit. He shall be and have been a member of the Bar of Florida for the preceding five years. Public defenders shall appoint such assistant public defenders as may be authorized by law.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 19. Judicial officers as conservators of the peace.**—All judicial officers in this state shall be conservators of the peace.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

**SECTION 20. Schedule to Article V.**—

(a) This article shall replace all of Article V of the Constitution of 1885, as amended, which shall then stand repealed.

(b) Except to the extent inconsistent with the provisions of this article, all provisions of law and rules of court in force on the effective date of this article shall continue in effect until superseded in the manner authorized by the constitution.

(c) After this article becomes effective, and until changed by general law consistent with sections 1 through 19 of this article:

(1) The supreme court shall have the jurisdiction immediately theretofore exercised by it, and it shall determine all proceedings pending before it on the effective date of this article.

(2) The appellate districts shall be those in existence on the date of adoption of this article. There shall be a district court of appeal in each district. The district courts of appeal shall have the jurisdiction immediately theretofore exercised by the district courts of appeal and shall determine all proceedings pending before them on the effective date of this article.

(3) Circuit courts shall have jurisdiction of appeals from county courts and municipal courts, except those appeals which may be taken directly to the supreme court; and they shall have exclusive original jurisdiction in all actions at law not cognizable by the county courts; of proceedings relating to the settlement of the estate of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate; in all cases in equity including all cases relating to juveniles; of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged; in all cases involving legality of any tax assessment or toll; in the action of ejectment; and in all actions involving the titles or boundaries or right of possession of real property. The circuit court may issue injunctions. There shall be judicial circuits which shall be the judicial circuits in existence on the date of adoption of this article. The chief judge of a circuit may authorize a county court judge to order emergency hospitalizations pursuant to Chapter 71-131, Laws of Florida, in the absence from the county of the circuit judge and the county court judge shall have the power to issue all temporary orders and temporary injunctions necessary or proper to the complete exercise of such jurisdiction.

(4) County courts shall have original jurisdiction in all criminal misdemeanor cases not cognizable by the circuit courts, of all violations of municipal and county ordinances, and of all actions at law in which the matter in controversy does not exceed the sum of two thousand five hundred dollars (\$2,500.00) exclusive of interest and costs, except those within the exclusive jurisdiction of the circuit courts. Judges of county courts shall be

committing magistrates. The county courts shall have jurisdiction now exercised by the county judge's courts other than that vested in the circuit court by subsection (c)(3) hereof, the jurisdiction now exercised by the county courts, the claims court, the small claims courts, the small claims magistrates courts, magistrates courts, justice of the peace courts, municipal courts and courts of chartered counties, including but not limited to the counties referred to in Article VIII, sections 9, 10, 11 and 24 of the Constitution of 1885.

(5) Each judicial nominating commission shall be composed of the following:

a. Three members appointed by the Board of Governors of The Florida Bar from among The Florida Bar members who are actively engaged in the practice of law with offices within the territorial jurisdiction of the affected court, district or circuit;

b. Three electors who reside in the territorial jurisdiction of the court or circuit appointed by the governor; and

c. Three electors who reside in the territorial jurisdiction of the court or circuit and who are not members of the bar of Florida, selected and appointed by a majority vote of the other six members of the commission.

(6) No justice or judge shall be a member of a judicial nominating commission. A member of a judicial nominating commission may hold public office other than judicial office. No member shall be eligible for appointment to state judicial office so long as he is a member of a judicial nominating commission and for a period of two years thereafter. All acts of a judicial nominating commission shall be made with a concurrence of a majority of its members.

(7) The members of a judicial nominating commission shall serve for a term of four years except the terms of the initial members of the judicial nominating commissions shall expire as follows:

a. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1974;

b. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1975;

c. The terms of one member of category a. b. and c. in subsection (c)(5) hereof shall expire on July 1, 1976;

(8) All fines and forfeitures arising from offenses tried in the county court shall be collected, and accounted for by clerk of the court, and deposited in a special trust account. All fines and forfeitures received from violations of ordinances or misdemeanors committed within a county or municipal ordinances committed within a municipality within the territorial jurisdiction of the county court shall be paid monthly to the county or

municipality respectively. If any costs are assessed and collected in connection with offenses tried in county court, all court costs shall be paid into the general revenue fund of the state of Florida and such other funds as prescribed by general law.

(9) Any municipality or county may apply to the chief judge of the circuit in which that municipality or county is situated for the county court to sit in a location suitable to the municipality or county and convenient in time and place to its citizens and police officers and upon such application said chief judge shall direct the court to sit in the location unless he shall determine the request is not justified. If the chief judge does not authorize the county court to sit in the location requested, the county or municipality may apply to the supreme court for an order directing the county court to sit in the location. Any municipality or county which so applies shall be required to provide the appropriate physical facilities in which the county court may hold court.

(10) All courts except the supreme court may sit in divisions as may be established by local rule approved by the supreme court.

(11) A county court judge in any county having a population of 40,000 or less according to the last decennial census, shall not be required to be a member of the bar of Florida.

(12) Municipal prosecutors may prosecute violations of municipal ordinances.

(13) Justice shall mean a justice elected or appointed to the supreme court and shall not include any judge assigned from any court.

(d) When this article becomes effective:

(1) All courts not herein authorized, except as provided by subsection (d)(4) of this section shall cease to exist and jurisdiction to conclude all pending cases and enforce all prior orders and judgments shall vest in the court that would have jurisdiction of the cause if thereafter instituted. All records of and property held by courts abolished hereby shall be transferred to the proper office of the appropriate court under this article.

(2) Judges of the following courts, if their terms do not expire in 1973 and if they are eligible under subsection (d)(8) hereof, shall become additional judges of the circuit court for each of the counties of their respective circuits, and shall serve as such circuit judges for the remainder of the terms to which they were elected and shall be eligible for election as circuit judges thereafter. These courts are: civil court of record of Dade county, all criminal courts of record, the felony courts of record of Alachua, Leon and Volusia Counties, the courts of record of Broward, Brevard, Escambia, Hillsborough, Lee, Manatee and Sarasota Counties, the civil and criminal court of record of Pinellas County, and county judge's courts and

separate juvenile courts in counties having a population in excess of 100,000 according to the 1970 federal census. On the effective date of this article, there shall be an additional number of positions of circuit judges equal to the number of existing circuit judges and the number of judges of the above named courts whose term expires in 1973. Elections to such offices shall take place at the same time and manner as elections to other state judicial offices in 1972 and the terms of such offices shall be for a term of six years. Unless changed pursuant to section nine of this article, the number of circuit judges presently existing and created by this subsection shall not be changed.

(3) In all counties having a population of less than 100,000 according to the 1970 federal census and having more than one county judge on the date of the adoption of this article, there shall be the same number of judges of the county court as there are county judges existing on that date unless changed pursuant to section 9 of this article.

(4) Municipal courts shall continue with their same jurisdiction until amended or terminated in a manner prescribed by special or general law or ordinances, or until January 3, 1977, whichever occurs first. On that date all municipal courts not previously abolished shall cease to exist. Judges of municipal courts shall remain in office and be subject to reappointment or reelection in the manner prescribed by law until said courts are terminated pursuant to the provisions of this subsection. Upon municipal courts being terminated or abolished in accordance with the provisions of this subsection, the judges thereof who are not members of the bar of Florida, shall be eligible to seek election as judges of county courts of their respective counties.

(5) Judges, holding elective office in all other courts abolished by this article, whose terms do not expire in 1973 including judges established pursuant to Article VIII, sections 9 and 11 of the Constitution of 1885 shall serve as judges of the county court for the remainder of the term to which they were elected. Unless created pursuant to section 9, of this Article V such judicial office shall not continue to exist thereafter.

(6) By March 21, 1972, the supreme court shall certify the need for additional circuit and county judges. The legislature in the 1972 regular session may by general law create additional offices of judge, the terms of which shall begin on the effective date of this article. Elections to such offices shall take place at the same time and manner as election to other state judicial offices in 1972.

(7) County judges of existing county judge's courts and justices of the peace and magistrates' court who are not members of bar of Florida shall be eligible to seek election as county court judges of their respective

counties.

(8) No judge of a court abolished by this article shall become or be eligible to become a judge of the circuit court unless he has been a member of bar of Florida for the preceding five years.

(9) The office of judges of all other courts abolished by this article shall be abolished as of the effective date of this article.

(10) The offices of county solicitor and prosecuting attorney shall stand abolished, and all county solicitors and prosecuting attorneys holding such offices upon the effective date of this article shall become and serve as assistant state attorneys for the circuits in which their counties are situate for the remainder of their terms, with compensation not less than that received immediately before the effective date of this article.

(e) LIMITED OPERATION OF SOME PROVISIONS.--

(1) All justices of the supreme court, judges of the district courts of appeal and circuit judges in office upon the effective date of this article shall retain their offices for the remainder of their respective terms. All members of the judicial qualifications commission in office upon the effective date of this article shall retain their offices for the remainder of their respective terms. Each state attorney in office on the effective date of this article shall retain his office for the remainder of his term.

(2) No justice or judge holding office immediately after this article becomes effective who held judicial office on July 1, 1957, shall be subject to retirement from judicial office because of age pursuant to section 8 of this article.

(f) Until otherwise provided by law, the nonjudicial duties required of county judges shall be performed by the judges of the county court.

<sup>1</sup>(g) All provisions of Article V of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

(h) The requirements of section 14 relative to all county court judges or any judge of a municipal court who continues to hold office pursuant to subsection (d)(4) hereof being compensated by state salaries shall not apply prior to January 3, 1977, unless otherwise provided by general law.

(i) DELETION OF OBSOLETE SCHEDULE ITEMS.--The legislature shall have power, by concurrent resolution, to delete from this article any subsection of this section 20 including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

(j) EFFECTIVE DATE.—Unless otherwise provided herein, this article shall become effective at 11:59 o'clock P.M., Eastern Standard Time,

January 1, 1973.

**History.**—S.J.R. 52-D, 1971; adopted 1972.

<sup>1</sup>**Note.**—All provisions of Art. V of the Constitution of 1885, as amended, considered as statutory law, were repealed by ch. 73- 303, Laws of Florida.

## ARTICLE VI

### SUFFRAGE AND ELECTIONS

Sec.

1. Regulation of elections.
2. Electors.
3. Oath.
4. Disqualifications.
5. General and special elections.
6. Municipal and district elections.

**SECTION 1. Regulation of elections.**—All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

**SECTION 2. Electors.**—Every citizen of the United States who is at least twenty-one years of age and who has been a permanent resident for one year in the state and six months in a county, if registered as provided by law, shall be an elector of that county. Provisions may be made by law for other bona fide residents of the state who are at least twenty-one years of age to vote in the election of presidential electors.

**SECTION 3. Oath.**—Each eligible citizen upon registering shall subscribe the following: “I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, and that I am qualified to register as an elector under the Constitution and laws of the State of Florida.”

**SECTION 4. Disqualifications.**—

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.

(b) No person may appear on the ballot for re-election to any of the



following offices:

- (1) Florida representative,
- (2) Florida senator,
- (3) Florida Lieutenant governor,
- (4) any office of the Florida cabinet,
- (5) U.S. Representative from Florida, or
- (6) U.S. Senator from Florida

if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years.

**History.**—Am. by Initiative Petition filed with the Secretary of State July 23, 1992; adopted 1992.

**SECTION 5. General and special elections.**—A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term. A general election may be suspended or delayed due to a state of emergency or impending emergency pursuant to general law. Special elections and referenda shall be held as provided by law.

**History.**—Am. S.J.R. 162, 1992; adopted 1992.

**SECTION 6. Municipal and district elections.**—Registration and elections in municipalities shall, and in other governmental entities created by statute may, be provided by law.

## ARTICLE VII

### FINANCE AND TAXATION

Sec.

1. Taxation; appropriations; state expenses.
2. Taxes; rate.
3. Taxes; exemptions.
4. Taxation; assessments.
5. Estate, inheritance and income taxes.
6. Homestead exemptions.
7. Allocation of pari-mutuel taxes.

8. Aid to local governments.
9. Local taxes.
10. Pledging credit.
11. State bonds; revenue bonds.
12. Local bonds.
13. Relief from illegal taxes.
14. Bonds for pollution control and abatement and other water facilities.
15. Revenue bonds for scholarship loans.
16. Bonds for housing and related facilities.
17. Bonds for acquiring transportation right-of-way or for constructing bridges.
18. Laws requiring counties or municipalities to spend funds or limiting their ability to raise revenue or receive state tax revenue.

**SECTION 1. Taxation; appropriations; state expenses.—**

(a) No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

(b) Motor vehicles, boats, airplanes, trailers, trailer coaches and mobile homes, as defined by law, shall be subject to a license tax for their operation in the amounts and for the purposes prescribed by law, but shall not be subject to ad valorem taxes.

(c) No money shall be drawn from the treasury except in pursuance of appropriation made by law.

(d) Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period.

**SECTION 2. Taxes; rate.**—All ad valorem taxation shall be at a uniform rate within each taxing unit, except the taxes on intangible personal property may be at different rates but shall never exceed two mills on the dollar of assessed value; provided, as to any obligations secured by mortgage, deed of trust, or other lien on real estate wherever located, an intangible tax of not more than two mills on the dollar may be levied by law to be in lieu of all other intangible assessments on such obligations.

**SECTION 3. Taxes; exemptions.—**

(a) All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is

located. Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.

(b) There shall be exempt from taxation, cumulatively, to every head of a family residing in this state, household goods and personal effects to the value fixed by general law, not less than one thousand dollars, and to every widow or widower or person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five hundred dollars.

(c) Any county or municipality may, for the purpose of its respective tax levy and subject to the provisions of this subsection and general law, grant community and economic development ad valorem tax exemptions to new businesses and expansions of existing businesses, as defined by general law. Such an exemption may be granted only by ordinance of the county or municipality, and only after the electors of the county or municipality voting on such question in a referendum authorize the county or municipality to adopt such ordinances. An exemption so granted shall apply to improvements to real property made by or for the use of a new business and improvements to real property related to the expansion of an existing business and shall also apply to tangible personal property of such new business and tangible personal property related to the expansion of an existing business. The amount or limits of the amount of such exemption shall be specified by general law. The period of time for which such exemption may be granted to a new business or expansion of an existing business shall be determined by general law. The authority to grant such exemption shall expire ten years from the date of approval by the electors of the county or municipality, and may be renewable by referendum as provided by general law.

<sup>1</sup>(d) By general law and subject to conditions specified therein, there may be granted an ad valorem tax exemption to a renewable energy source device and to real property on which such device is installed and operated, to the value fixed by general law not to exceed the original cost of the device, and for the period of time fixed by general law not to exceed ten years.

(e) Any county or municipality may, for the purpose of its respective tax levy and subject to the provisions of this subsection and general law, grant historic preservation ad valorem tax exemptions to owners of historic properties engaging in the rehabilitation or renovation of these properties in accordance with approved historic preservation guidelines. This exemption may be granted only by ordinance of the county or municipality. The amount or limits of the amount of this exemption and the requirements for

eligible properties must be specified by general law. The period of time for which this exemption may be granted to a property owner shall be determined by general law.

**History.**—Am. S.J.R.'s 9-E, 15-E, 1980; adopted 1980; Am. C.S. for S.J.R.'s 318, 356, 1988; adopted 1988; Am. S.J.R. 152, 1992; adopted 1992.

<sup>1</sup>**Note.**—This subsection, originally designated (c) by S.J.R. 15-E, 1980, was redesignated (d) by the editors in order to avoid confusion with subsection (c) as contained in S.J.R. 9-E, 1980. cf.—s. 19, Art. XII Schedule.

**SECTION 4. Taxation; assessments.**—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(a) Agricultural land, land producing high water recharge to Florida's aquifers or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use.

(b) Pursuant to general law tangible personal property held for sale as stock in trade and livestock may be valued for taxation at a specified percentage of its value, may be classified for tax purposes, or may be exempted from taxation.

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

(A) three percent (3%) of the assessment for the prior year.

(B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. No assessment shall exceed just value.

3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

5. Changes, additions, reductions or improvements to homestead

property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.

6. In the event of a termination of homestead status, the property shall be assessed as provided by general law.

7. The provisions of this amendment are severable. If any of the provisions of this amendment shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any remaining provisions of this amendment.

**History.**—Am. S.J.R. 12-E, 1980; adopted 1980; Am. H.J.R. 214, 1987; adopted 1988; Am. by Initiative Petition filed with the Secretary of State August 3, 1992; adopted 1992.

### **SECTION 5. Estate, inheritance and income taxes.—**

(a) **NATURAL PERSONS.** No tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state.

(b) **OTHERS.** No tax upon the income of residents and citizens other than natural persons shall be levied by the state, or under its authority, in excess of 5% of net income, as defined by law, or at such greater rate as is authorized by a three-fifths ( $\frac{3}{5}$ ) vote of the membership of each house of the legislature or as will provide for the state the maximum amount which may be allowed to be credited against income taxes levied by the United States and other states. There shall be exempt from taxation not less than five thousand dollars (\$5,000) of the excess of net income subject to tax over the maximum amount allowed to be credited against income taxes levied by the United States and other states.

(c) **EFFECTIVE DATE.** This section shall become effective immediately upon approval by the electors of Florida.

**History.**—Am. H.J.R. 7-B, 1971; adopted 1971.

### **SECTION 6. Homestead exemptions.—**

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of

ninety-eight years.

(b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the proportion which his interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the exemption shall be increased to a total of twenty-five thousand dollars of the assessed value of the real estate for each school district levy. By general law and subject to conditions specified therein, the exemption for all other levies may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five or is totally and permanently disabled and if the owner is not entitled to the exemption provided in subsection (d).

(d) By general law and subject to conditions specified therein, the exemption shall be increased to a total of the following amounts of assessed value of real estate for each levy other than those of school districts: fifteen thousand dollars with respect to 1980 assessments; twenty thousand dollars with respect to 1981 assessments; twenty-five thousand dollars with respect to assessments for 1982 and each year thereafter. However, such increase shall not apply with respect to any assessment roll until such roll is first determined to be in compliance with the provisions of section 4 by a state agency designated by general law. This subsection shall stand repealed on the effective date of any amendment to section 4 which provides for the assessment of homestead property at a specified percentage of its just value.

(e) By general law and subject to conditions specified therein, the Legislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law.

**History.**—Am. S.J.R. 1-B, 1979; adopted 1980; Am. S.J.R. 4-E, 1980; adopted 1980.

**SECTION 7. Allocation of pari-mutuel taxes.**—Taxes upon the operation of pari-mutuel pools may be preempted to the state or allocated in whole or in part to the counties. When allocated to the counties, the distribution shall be in equal amounts to the several counties.

**SECTION 8. Aid to local governments.**—State funds may be appropriated to the several counties, school districts, municipalities or special districts upon such conditions as may be provided by general law. These conditions may include the use of relative ad valorem assessment

levels determined by a state agency designated by general law.

**History.**—Am. S.J.R. 4-E, 1980; adopted 1980.

#### **SECTION 9. Local taxes.—**

(a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

(b) Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; for water management purposes for the northwest portion of the state lying west of the line between ranges two and three east, 0.05 mill; for water management purposes for the remaining portions of the state, 1.0 mill; and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

**History.**—Am. S.J.R. 1061, 1975; adopted 1976.

**SECTION 10. Pledging credit.**—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing:

- (a) the investment of public trust funds;
- (b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;
- (c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so

financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

(d) a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person.

*History.*—Am. H.J.R. 1424, 1973; adopted 1974.

#### **SECTION 11. State bonds; revenue bonds.—**

(a) State bonds pledging the full faith and credit of the state may be issued only to finance or refinance the cost of state fixed capital outlay projects authorized by law, and purposes incidental thereto, upon approval by a vote of the electors; provided state bonds issued pursuant to this subsection may be refunded without a vote of the electors at a lower net average interest cost rate. The total outstanding principal of state bonds issued pursuant to this subsection shall never exceed fifty percent of the total tax revenues of the state for the two preceding fiscal years, excluding any tax revenues held in trust under the provisions of this constitution.

(b) Moneys sufficient to pay debt service on state bonds as the same becomes due shall be appropriated by law.

(c) Any state bonds pledging the full faith and credit of the state issued under this section or any other section of this constitution may be combined for the purposes of sale.

(d) Revenue bonds may be issued by the state or its agencies without a vote of the electors to finance or refinance the cost of state fixed capital outlay projects authorized by law, and purposes incidental thereto, and shall be payable solely from funds derived directly from sources other than state tax revenues.

(e) Each project, building, or facility to be financed or refinanced with revenue bonds issued under this section shall first be approved by the Legislature by an act relating to appropriations or by general law.

*History.*—Am. C.S. for C.S. for S.J.R. 612, 1984; adopted 1984.

**SECTION 12. Local bonds.**—Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve



months after issuance only:

(a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or

(b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

**SECTION 13. Relief from illegal taxes.**—Until payment of all taxes which have been legally assessed upon the property of the same owner, no court shall grant relief from the payment of any tax that may be illegal or illegally assessed.

**SECTION 14. Bonds for pollution control and abatement and other water facilities.**—

(a) When authorized by law, state bonds pledging the full faith and credit of the state may be issued without an election to finance the construction of air and water pollution control and abatement and solid waste disposal facilities and other water facilities authorized by general law (herein referred to as “facilities”) to be operated by any municipality, county, district or authority, or any agency thereof (herein referred to as “local governmental agencies”), or by any agency of the State of Florida. Such bonds shall be secured by a pledge of and shall be payable primarily from all or any part of revenues to be derived from operation of such facilities, special assessments, rentals to be received under lease-purchase agreements herein provided for, any other revenues that may be legally available for such purpose, including revenues from other facilities, or any combination thereof (herein collectively referred to as “pledged revenues”), and shall be additionally secured by the full faith and credit of the State of Florida.

(b) No such bonds shall be issued unless a state fiscal agency, created by law, has made a determination that in no state fiscal year will the debt service requirements of the bonds proposed to be issued and all other bonds secured by the pledged revenues exceed seventy-five per cent of the pledged revenues.

(c) The state may lease any of such facilities to any local governmental agency, under lease-purchase agreements for such periods and under such other terms and conditions as may be mutually agreed upon. The local governmental agencies may pledge the revenues derived from such leased facilities or any other available funds for the payment of rentals thereunder; and, in addition, the full faith and credit and taxing power of such local governmental agencies may be pledged for the payment of such rentals

without any election of freeholder electors or qualified electors.

(d) The state may also issue such bonds for the purpose of loaning money to local governmental agencies, for the construction of such facilities to be owned or operated by any of such local governmental agencies. Such loans shall bear interest at not more than one-half of one per cent per annum greater than the last preceding issue of state bonds pursuant to this section, shall be secured by the pledged revenues, and may be additionally secured by the full faith and credit of the local governmental agencies.

(e) The total outstanding principal of state bonds issued pursuant to this section 14 shall never exceed fifty per cent of the total tax revenues of the state for the two preceding fiscal years.

**History.**—C.S. for H.J.R.'s 3853, 4040, 1970; adopted 1970; Am. H.J.R. 1471, 1980; adopted 1980.

#### **SECTION 15. Revenue bonds for scholarship loans.—**

(a) When authorized by law, revenue bonds may be issued to establish a fund to make loans to students determined eligible as prescribed by law and who have been admitted to attend any public or private institutions of higher learning, junior colleges, health related training institutions, or vocational training centers, which are recognized or accredited under terms and conditions prescribed by law. Revenue bonds issued pursuant to this section shall be secured by a pledge of and shall be payable primarily from payments of interest, principal, and handling charges to such fund from the recipients of the loans and, if authorized by law, may be additionally secured by student fees and by any other moneys in such fund. There shall be established from the proceeds of each issue of revenue bonds a reserve account in an amount equal to and sufficient to pay the greatest amount of principal, interest, and handling charges to become due on such issue in any ensuing state fiscal year.

(b) Interest moneys in the fund established pursuant to this section, not required in any fiscal year for payment of debt service on then outstanding revenue bonds or for maintenance of the reserve account, may be used for educational loans to students determined to be eligible therefor in the manner provided by law, or for such other related purposes as may be provided by law.

**History.**—Added, H.J.R. 46-D, 1971; adopted 1972.

#### **SECTION 16. Bonds for housing and related facilities.—**

(a) When authorized by law, revenue bonds may be issued without an election to finance or refinance housing and related facilities in Florida, herein referred to as “facilities.”

(b) The bonds shall be secured by a pledge of and shall be payable

primarily from all or any part of revenues to be derived from the financing, operation or sale of such facilities, mortgage or loan payments, and any other revenues or assets that may be legally available for such purposes derived from sources other than ad valorem taxation, including revenues from other facilities, or any combination thereof, herein collectively referred to as "pledged revenues," provided that in no event shall the full faith and credit of the state be pledged to secure such revenue bonds.

(c) No bonds shall be issued unless a state fiscal agency, created by law, has made a determination that in no state fiscal year will the debt service requirements of the bonds proposed to be issued and all other bonds secured by the same pledged revenues exceed the pledged revenues available for payment of such debt service requirements, as defined by law.

*History.*—Added, S.J.R. 6-E, 1980; adopted 1980.

cf.—s. 18, Art. XII Schedule.

#### **SECTION 17. Bonds for acquiring transportation right-of-way or for constructing bridges.—**

(a) When authorized by law, state bonds pledging the full faith and credit of the state may be issued, without a vote of the electors, to finance or refinance the cost of acquiring real property or the rights to real property for state roads as defined by law, or to finance or refinance the cost of state bridge construction, and purposes incidental to such property acquisition or state bridge construction.

(b) Bonds issued under this section shall be secured by a pledge of and shall be payable primarily from motor fuel or special fuel taxes, except those defined in Section 9(c) of Article XII, as provided by law, and shall additionally be secured by the full faith and credit of the state.

(c) No bonds shall be issued under this section unless a state fiscal agency, created by law, has made a determination that in no state fiscal year will the debt service requirements of the bonds proposed to be issued and all other bonds secured by the same pledged revenues exceed ninety percent of the pledged revenues available for payment of such debt service requirements, as defined by law. For the purposes of this subsection, the term "pledged revenues" means all revenues pledged to the payment of debt service, excluding any pledge of the full faith and credit of the state.

*History.*—Added, C.S. for C.S. for S.J.R. 391, 1988; adopted 1988.

#### **SECTION 18. Laws requiring counties or municipalities to spend funds or limiting their ability to raise revenue or receive state tax revenue.—**

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action

requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.

(b) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.

(c) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the percentage of a state tax shared with counties and municipalities as an aggregate on February 1, 1989. The provisions of this subsection shall not apply to enhancements enacted after February 1, 1989, to state tax sources, or during a fiscal emergency declared in a written joint proclamation issued by the president of the senate and the speaker of the house of representatives, or where the legislature provides additional state-shared revenues which are anticipated to be sufficient to replace the anticipated aggregate loss of state-shared revenues resulting from the reduction of the percentage of the state tax shared with counties and municipalities, which source of replacement revenues shall be subject to the same requirements for repeal or modification as provided herein for a state-shared tax source existing on February 1, 1989.

(d) Laws adopted to require funding of pension benefits existing on the effective date of this section, criminal laws, election laws, the general appropriations act, special appropriations acts, laws reauthorizing but not expanding then-existing statutory authority, laws having insignificant fiscal impact, and laws creating, modifying, or repealing noncriminal infractions, are exempt from the requirements of this section.

(e) The legislature may enact laws to assist in the implementation and enforcement of this section.

**History.**—Added, C.S. for C.S. for C.S. for C.S. for H.J.R.'s 139, 40, 1989; adopted 1990.

## ARTICLE VIII

### LOCAL GOVERNMENT

Sec.

1. Counties.
2. Municipalities.
3. Consolidation.
4. Transfer of powers.
5. Local option.
6. Schedule to Article VIII.

#### SECTION 1. Counties.—

(a) **POLITICAL SUBDIVISIONS.** The state shall be divided by law into political subdivisions called counties. Counties may be created, abolished or changed by law, with provision for payment or apportionment of the public debt.

(b) **COUNTY FUNDS.** The care, custody and method of disbursing county funds shall be provided by general law.

(c) **GOVERNMENT.** Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose.

(d) **COUNTY OFFICERS.** There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

(e) **COMMISSIONERS.** Except when otherwise provided by county charter, the governing body of each county shall be a board of county

commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law.

(f) **NON-CHARTER GOVERNMENT.** Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

(g) **CHARTER GOVERNMENT.** Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

(h) **TAXES; LIMITATION.** Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas.

(i) **COUNTY ORDINANCES.** Each county ordinance shall be filed with the secretary of state and shall become effective at such time thereafter as is provided by general law.

(j) **VIOLATION OF ORDINANCES.** Persons violating county ordinances shall be prosecuted and punished as provided by law.

(k) **COUNTY SEAT.** In every county there shall be a county seat at which shall be located the principal offices and permanent records of all county officers. The county seat may not be moved except as provided by general law. Branch offices for the conduct of county business may be established elsewhere in the county by resolution of the governing body of the county in the manner prescribed by law. No instrument shall be deemed recorded in the county until filed at the county seat according to law.

*History.—Am. H.J.R. 1907, 1973; adopted 1974; Am. H.J.R. 452, 1984; adopted 1984.*

## **SECTION 2. Municipalities.—**

(a) **ESTABLISHMENT.** Municipalities may be established or abolished and their charters amended pursuant to general or special law. When any municipality is abolished, provision shall be made for the

protection of its creditors.

(b) **POWERS.** Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

(c) **ANNEXATION.** Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law.

**SECTION 3. Consolidation.**—The government of a county and the government of one or more municipalities located therein may be consolidated into a single government which may exercise any and all powers of the county and the several municipalities. The consolidation plan may be proposed only by special law, which shall become effective if approved by vote of the electors of the county, or of the county and municipalities affected, as may be provided in the plan. Consolidation shall not extend the territorial scope of taxation for the payment of pre-existing debt except to areas whose residents receive a benefit from the facility or service for which the indebtedness was incurred.

**SECTION 4. Transfer of powers.**—By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

**SECTION 5. Local option.**—Local option on the legality or prohibition of the sale of intoxicating liquors, wines or beers shall be preserved to each county. The status of a county with respect thereto shall be changed only by vote of the electors in a special election called upon the petition of twenty-five per cent of the electors of the county, and not sooner than two years after an earlier election on the same question. Where legal, the sale of intoxicating liquors, wines and beers shall be regulated by law.

**SECTION 6. Schedule to Article VIII.**—

(a) This article shall replace all of Article VIII of the Constitution of 1885, as amended, except those sections expressly retained and made a part of this article by reference.

(b) **COUNTIES; COUNTY SEATS; MUNICIPALITIES; DISTRICTS.**

The status of the following items as they exist on the date this article becomes effective is recognized and shall be continued until changed in accordance with law: the counties of the state; their status with respect to the legality of the sale of intoxicating liquors, wines and beers; the method of selection of county officers; the performance of municipal functions by county officers; the county seats; and the municipalities and special districts of the state, their powers, jurisdiction and government.

(c) OFFICERS TO CONTINUE IN OFFICE. Every person holding office when this article becomes effective shall continue in office for the remainder of the term if that office is not abolished. If the office is abolished the incumbent shall be paid adequate compensation, to be fixed by law, for the loss of emoluments for the remainder of the term.

(d) ORDINANCES. Local laws relating only to unincorporated areas of a county on the effective date of this article may be amended or repealed by county ordinance.

(e) CONSOLIDATION AND HOME RULE. Article VIII, Sections <sup>1</sup>9, <sup>2</sup>10, <sup>3</sup>11 and <sup>4</sup>24, of the Constitution of 1885, as amended, shall remain in full force and effect as to each county affected, as if this article had not been adopted, until that county shall expressly adopt a charter or home rule plan pursuant to this article. All provisions of the Metropolitan Dade County Home Rule Charter, heretofore or hereafter adopted by the electors of Dade County pursuant to <sup>3</sup>Article VIII, Section 11, of the Constitution of 1885, as amended, shall be valid, and any amendments to such charter shall be valid; provided that the said provisions of such charter and the said amendments thereto are authorized under said <sup>3</sup>Article VIII, Section 11, of the Constitution of 1885, as amended.

(f) DADE COUNTY; POWERS CONFERRED UPON MUNICIPALITIES. To the extent not inconsistent with the powers of existing municipalities or general law, the Metropolitan Government of Dade County may exercise all the powers conferred now or hereafter by general law upon municipalities.

(g) DELETION OF OBSOLETE SCHEDULE ITEMS. The legislature shall have power, by joint resolution, to delete from this article any subsection of this Section 6, including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

<sup>1</sup>Note.—Section 9 of Art. VIII of the Constitution of 1885, as amended, reads as follows:

SECTION 9. Legislative power over city of Jacksonville and Duval County.--The Legislature shall have power to establish, alter or abolish, a Municipal corporation to be known as the City of Jacksonville, extending territorially throughout the present limits of Duval County, in the place of any



or all county, district, municipal and local governments, boards, bodies and officers, constitutional or statutory, legislative, executive, judicial, or administrative, and shall prescribe the jurisdiction, powers, duties and functions of such municipal corporation, its legislative, executive, judicial and administrative departments and its boards, bodies and officers; to divide the territory included in such municipality into subordinate districts, and to prescribe a just and reasonable system of taxation for such municipality and districts; and to fix the liability of such municipality and districts. Bonded and other indebtedness, existing at the time of the establishment of such municipality, shall be enforceable only against property theretofore taxable therefor. The Legislature shall, from time to time, determine what portion of said municipality is a rural area, and a homestead in such rural area shall not be limited as if in a city or town. Such municipality may exercise all the powers of a municipal corporation and shall also be recognized as one of the legal political divisions of the State with the duties and obligations of a county and shall be entitled to all the powers, rights and privileges, including representation in the State Legislature, which would accrue to it if it were a county. All property of Duval County and of the municipalities in said county shall vest in such municipal corporation when established as herein provided. The offices of Clerk of the Circuit Court and Sheriff shall not be abolished but the Legislature may prescribe the time when, and the method by which, such offices shall be filled and the compensation to be paid to such officers and may vest in them additional powers and duties. No county office shall be abolished or consolidated with another office without making provision for the performance of all State duties now or hereafter prescribed by law to be performed by such county officer. Nothing contained herein shall affect Section 20 of Article III of the Constitution of the State of Florida, except as to such provisions therein as relate to regulating the jurisdiction and duties of any class of officers, to summoning and impanelling grand and petit jurors, to assessing and collecting taxes for county purposes and to regulating the fees and compensation of county officers. No law authorizing the establishing or abolishing of such Municipal corporation pursuant to this Section, shall become operative or effective until approved by a majority of the qualified electors participating in an election held in said County, but so long as such Municipal corporation exists under this Section the Legislature may amend or extend the law authorizing the same without referendum to the qualified voters unless the Legislative act providing for such amendment or extension shall provide for such referendum.

**History.**—Added, S.J.R. 113, 1933; adopted 1934.

<sup>2</sup>**Note.**—Section 10, Art. VIII of the Constitution of 1885, as amended, reads as follows:

**SECTION 10.** Legislative power over city of Key West and Monroe county.--The Legislature shall have power to establish, alter or abolish, a Municipal corporation to be known as the City of Key West, extending territorially throughout the present limits of Monroe County, in the place of any or all county, district, municipal and local governments, boards, bodies and officers, constitutional or statutory, legislative, executive, judicial, or administrative, and shall prescribe the jurisdiction, powers, duties and functions of such municipal corporation, its legislative, executive, judicial and administrative departments and its boards, bodies and officers; to divide the territory included in such municipality into subordinate districts, and to prescribe a just and reasonable system of taxation for such municipality and districts; and to fix the liability of such municipality and districts. Bonded and other indebtedness, existing at the time of the establishment of such municipality, shall be enforceable only against property theretofore taxable therefor. The Legislature shall, from time to time, determine what portion of said municipality is a rural area, and a homestead in such rural area shall not be limited as if in a city or town. Such municipality may exercise all the powers of a municipal corporation and shall also be recognized as one of the legal political divisions of the State with the duties and obligations of a county and shall be entitled to all the powers, rights and privileges, including representation in the State Legislature, which would accrue to it if it were a county. All property of Monroe County and of the municipality in said county shall vest in such municipal corporation when established as herein provided. The offices of Clerk of the Circuit Court and Sheriff shall not be abolished but the Legislature may prescribe the time when, and the method by which, such offices shall be filled and the compensation to be paid to such officers and may vest in them additional powers and duties. No county office shall be abolished or consolidated with another office without making provision for the performance of all State duties now or hereafter prescribed by law to be performed by such county officer. Nothing contained herein shall affect Section 20 of Article III of the Constitution of the State of Florida, except as to such provisions therein as relate to regulating

the jurisdiction and duties of any class of officers, to summoning and impanelling grand and petit juries, to assessing and collecting taxes for county purposes and to regulating the fees and compensation of county officers. No law authorizing the establishing or abolishing of such Municipal corporation pursuant to this Section shall become operative or effective until approved by a majority of the qualified electors participating in an election held in said County, but so long as such Municipal corporation exists under this Section the Legislature may amend or extend the law authorizing the same without referendum to the qualified voters unless the Legislative Act providing for such amendment or extension shall provide for such referendum.

**History.**—Added, S.J.R. 429, 1935; adopted 1936.

<sup>3</sup>**Note.**—Section 11 of Art. VIII of the Constitution of 1885, as amended, reads as follows:

**SECTION 11.** Dade County, home rule charter.—(1) The electors of Dade County, Florida, are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida, under which the Board of County Commissioners of Dade County shall be the governing body. This charter:

(a) Shall fix the boundaries of each county commission district, provide a method for changing them from time to time, and fix the number, terms and compensation of the commissioners, and their method of election.

(b) May grant full power and authority to the Board of County Commissioners of Dade County to pass ordinances relating to the affairs, property and government of Dade County and provide suitable penalties for the violation thereof; to levy and collect such taxes as may be authorized by general law and no other taxes, and to do everything necessary to carry on a central metropolitan government in Dade County.

(c) May change the boundaries of, merge, consolidate, and abolish and may provide a method for changing the boundaries of, merging, consolidating and abolishing from time to time all municipal corporations, county or district governments, special taxing districts, authorities, boards, or other governmental units whose jurisdiction lies wholly within Dade County, whether such governmental units are created by the Constitution or the Legislature or otherwise, except the Dade County Board of County Commissioners as it may be provided for from time to time by this home rule charter and the Board of Public Instruction of Dade County.

(d) May provide a method by which any and all of the functions or powers of any municipal corporation or other governmental unit in Dade County may be transferred to the Board of County Commissioners of Dade County.

(e) May provide a method for establishing new municipal corporations, special taxing districts, and other governmental units in Dade County from time to time and provide for their government and prescribe their jurisdiction and powers.

(f) May abolish and may provide a method for abolishing from time to time all offices provided for by Article VIII, Section 6, of the Constitution or by the Legislature, except the Superintendent of Public Instruction and may provide for the consolidation and transfer of the functions of such offices, provided, however, that there shall be no power to abolish or impair the jurisdiction of the Circuit Court or to abolish any other court provided for by this Constitution or by general law, or the judges or clerks thereof although such charter may create new courts and judges and clerks thereof with jurisdiction to try all offenses against ordinances passed by the Board of County Commissioners of Dade County and none of the other courts provided for by this Constitution or by general law shall have original jurisdiction to try such offenses, although the charter may confer appellate jurisdiction on such courts, and provided further that if said home rule charter shall abolish any county office or offices as authorized herein, that said charter shall contain adequate provision for the carrying on of all functions of said office or offices as are now or may hereafter be prescribed by general law.

(g) Shall provide a method by which each municipal corporation in Dade County shall have the power to make, amend or repeal its own charter. Upon adoption of this home rule charter by the electors this method shall be exclusive and the Legislature shall have no power to amend or repeal the charter of any municipal corporation in Dade County.

(h) May change the name of Dade County.

(i) Shall provide a method for the recall of any commissioner and a method for initiative and

referendum, including the initiation of and referendum on ordinances and the amendment or revision of the home rule charter, provided, however, that the power of the Governor and Senate relating to the suspension and removal of officers provided for in this Constitution shall not be impaired, but shall extend to all officers provided for in said home rule charter.

(2) Provision shall be made for the protection of the creditors of any governmental unit which is merged, consolidated, or abolished or whose boundaries are changed or functions or powers transferred.

(3) This home rule charter shall be prepared by a Metropolitan Charter Board created by the Legislature and shall be presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Until a home rule charter is adopted the Legislature may from time to time create additional Charter Boards to prepare charters to be presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Such Charter, once adopted by the electors, may be amended only by the electors of Dade County and this charter shall provide a method for submitting future charter revisions and amendments to the electors of Dade County.

(4) The County Commission shall continue to receive its pro rata share of all revenues payable by the state from whatever source to the several counties and the state of Florida shall pay to the Commission all revenues which would have been paid to any municipality in Dade County which may be abolished by or in the method provided by this home rule charter; provided, however, the Commission shall reimburse the comptroller of Florida for the expense incurred if any, in the keeping of separate records to determine the amounts of money which would have been payable to any such municipality.

(5) Nothing in this section shall limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties in the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida, and the home rule charter provided for herein shall not conflict with any provision of this Constitution nor of any applicable general laws now applying to Dade County and any other one or more counties of the State of Florida except as expressly authorized in this section nor shall any ordinance enacted in pursuance to said home rule charter conflict with this Constitution or any such applicable general law except as expressly authorized herein, nor shall the charter of any municipality in Dade County conflict with this Constitution or any such applicable general law except as expressly authorized herein, provided however that said charter and said ordinances enacted in pursuance thereof may conflict with, modify or nullify any existing local, special or general law applicable only to Dade County.

(6) Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida relating to county or municipal affairs and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

(7) Nothing in this section shall be construed to limit or restrict the power and jurisdiction of the Railroad and Public Utilities Commission or of any other state agency, bureau or commission now or hereafter provided for in this Constitution or by general law and said state agencies, bureaus and commissions shall have the same powers in Dade County as shall be conferred upon them in regard to other counties.

(8) If any section, subsection, sentence, clause or provisions of this section is held invalid as violative of the provisions of Section 1 Article XVII of this Constitution the remainder of this section shall not be affected by such invalidity.

(9) It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except

as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.

**History.**—Added, H.J.R. 858, 1941; adopted 1942; Am. S.J.R. 1046, 1955; adopted 1956.

**\*Note.**—Section 24 of Art. VIII of the Constitution of 1885, as amended, reads as follows:

SECTION 24. Hillsborough County, home rule charter.—

(1) The electors of Hillsborough county are hereby granted the power to adopt a charter for a government which shall exercise any and all powers for county and municipal purposes which this constitution or the legislature, by general, special or local law, has conferred upon Hillsborough county or any municipality therein. Such government shall exercise these powers by the enactment of ordinances which relate to government of Hillsborough county and provide suitable penalties for the violation thereof. Such government shall have no power to create or abolish any municipality, except as otherwise provided herein.

(2) The method and manner by which the electors of Hillsborough county shall exercise this power shall be set forth in a charter for the government of Hillsborough county which charter shall be presented to said electors by any charter commission established by the legislature. The legislature may provide for the continuing existence of any charter commission or may establish a charter commission or commissions subsequent to any initial commission without regard to any election or elections held upon any charter or charters theretofore presented. A charter shall become effective only upon ratification by a majority of the electors of Hillsborough county voting in a general or special election as provided by law.

(3) The number, qualifications, terms of office and method of filling vacancies in the membership of any charter commission established pursuant to this section and the powers, functions and duties of any such commission shall be provided by law.

(4) A charter prepared by any commission established pursuant to this section shall provide that:

(a) The governments of the city of Tampa and the county of Hillsborough shall be consolidated, and the structure of the new local government shall include:

1. An executive branch, the chief officer of which shall be responsible for the administration of government.

2. An elected legislative branch, the election to membership, powers and duties of which shall be as provided by the charter.

3. A judicial branch, which shall only have jurisdiction in the enforcement of ordinances enacted by the legislative branch created by this section.

(b) Should the electors of the municipalities of Plant City or Temple Terrace wish to consolidate their governments with the government hereinabove created, they may do so by majority vote of the electors of said municipality voting in an election upon said issue.

(c) The creditors of any governmental unit consolidated or abolished under this section shall be protected. Bonded or other indebtedness existing at the effective date of any government established hereunder shall be enforceable only against the real and personal property theretofore taxable for such purposes.

(d) Such other provisions as might be required by law.

(5) The provisions of such charter and ordinances enacted pursuant thereto shall not conflict with any provision of this constitution nor with general, special or local laws now or hereafter applying to Hillsborough county.

(6) The government established hereunder shall be recognized as a county, that is one of the legal political subdivisions of the state with the powers, rights, privileges, duties and obligations of a county, and may also exercise all the powers of a municipality. Said government shall have the right to sue and be sued.

(7) Any government established hereunder shall be entitled to receive from the state of Florida or from the United States or from any other agency, public or private, funds and revenues to which a county is, or may hereafter be entitled, and also all funds and revenues to which an incorporated municipality is or may hereafter be entitled, and to receive the same without diminution or loss by reason of any such government as may be established. Nothing herein contained shall preclude such government as may be established hereunder from receiving all funds and revenues from whatever source now

received, or hereinafter received provided by law.

(8) The board of county commissioners of Hillsborough county shall be abolished when the functions, duties, powers and responsibilities of said board shall be transferred in the manner to be provided by the charter to the government established pursuant to this section. No other office provided for by this constitution shall be abolished by or pursuant to this section.

(9) This section shall not restrict or limit the legislature in the enactment of general, special or local laws as otherwise provided in this constitution.

**History.**—Added, C.S. for H.J.R. 1987, 1965; adopted 1966.

## ARTICLE IX

### EDUCATION

#### Sec.

1. System of public education.
2. State board of education.
3. Terms of appointive board members.
4. School districts; school boards.
5. Superintendent of schools.
6. State school fund.

**SECTION 1. System of public education.**—Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

**SECTION 2. State board of education.**—The governor and the members of the cabinet shall constitute a state board of education, which shall be a body corporate and have such supervision of the system of public education as is provided by law.

**SECTION 3. Terms of appointive board members.**—Members of any appointive board dealing with education may serve terms in excess of four years as provided by law.

#### **SECTION 4. School districts; school boards.**—

(a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriately staggered terms of four years, as

provided by law.

(b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

**SECTION 5. Superintendent of schools.**—In each school district there shall be a superintendent of schools. He shall be elected at the general election in each year the number of which is a multiple of four for a term of four years; or, when provided by resolution of the district school board, or by special law, approved by vote of the electors, the district school superintendent in any school district shall be employed by the district school board as provided by general law. The resolution or special law may be rescinded or repealed by either procedure after four years.

**SECTION 6. State school fund.**—The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

## ARTICLE X

### MISCELLANEOUS

Sec.

1. Amendments to United States Constitution.
2. Militia.
3. Vacancy in office.
4. Homestead; exemptions.
5. Coverture and property.
6. Eminent domain.
7. Lotteries.
8. Census.
9. Repeal of criminal statutes.
10. Felony; definition.
11. Sovereignty lands.
12. Rules of construction.
13. Suits against the state.
14. State retirement systems benefit changes.
15. State operated lotteries.

**SECTION 1. Amendments to United States Constitution.**—The legislature shall not take action on any proposed amendment to the constitution of the United States unless a majority of the members thereof have been elected after the proposed amendment has been submitted for ratification.

**SECTION 2. Militia.**—

(a) The militia shall be composed of all ablebodied inhabitants of the state who are or have declared their intention to become citizens of the United States; and no person because of religious creed or opinion shall be exempted from military duty except upon conditions provided by law.

(b) The organizing, equipping, housing, maintaining, and disciplining of the militia, and the safekeeping of public arms may be provided for by law.

(c) The governor shall appoint all commissioned officers of the militia, including an adjutant general who shall be chief of staff. The appointment of all general officers shall be subject to confirmation by the senate.

(d) The qualifications of personnel and officers of the federally recognized national guard, including the adjutant general, and the grounds and proceedings for their discipline and removal shall conform to the appropriate United States army or air force regulations and usages.

**SECTION 3. Vacancy in office.**—Vacancy in office shall occur upon the creation of an office, upon the death of the incumbent or his removal from office, resignation, succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

**SECTION 4. Homestead; exemptions.**—

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be

limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

**History.**—Am. H.J.R. 4324, 1972; adopted 1972; Am. H.J.R. 40, 1983; adopted 1984.

**SECTION 5. Coverture and property.**—There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

**SECTION 6. Eminent domain.**—

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

**SECTION 7. Lotteries.**—Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state.

**SECTION 8. Census.**—

(a) Each decennial census of the state taken by the United States shall be an official census of the state.

(b) Each decennial census, for the purpose of classifications based upon population, shall become effective on the thirtieth day after the final adjournment of the regular session of the legislature convened next after certification of the census.

**SECTION 9. Repeal of criminal statutes.**—Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.



**SECTION 10. Felony; definition.**—The term “felony” as used herein and in the laws of this state shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or by imprisonment in the state penitentiary.

**SECTION 11. Sovereignty lands.**—The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

*History.*—Am. H.J.R. 792, 1970; adopted 1970.

**SECTION 12. Rules of construction.**—Unless qualified in the text the following rules of construction shall apply to this constitution.

- (a) “Herein” refers to the entire constitution.
- (b) The singular includes the plural.
- (c) The masculine includes the feminine.
- (d) “Vote of the electors” means the vote of the majority of those voting on the matter in an election, general or special, in which those participating are limited to the electors of the governmental unit referred to in the text.
- (e) Vote or other action of a legislative house or other governmental body means the vote or action of a majority or other specified percentage of those members voting on the matter. “Of the membership” means “of all members thereof.”
- (f) The terms “judicial office,” “justices” and “judges” shall not include judges of courts established solely for the trial of violations of ordinances.
- (g) “Special law” means a special or local law.
- (h) Titles and subtitles shall not be used in construction.

**SECTION 13. Suits against the state.**—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

**SECTION 14. State retirement systems benefit changes.**—A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any

increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

**History.**—Added, H.J.R. 291, 1975; adopted 1976.

**SECTION 15. State operated lotteries.—**

(a) Lotteries may be operated by the state.

(b) If any subsection or subsections of the amendment to the Florida Constitution are held unconstitutional for containing more than one subject, this amendment shall be limited to subsection (a) above.

(c) This amendment shall be implemented as follows:

(1) **Schedule**—On the effective date of this amendment, the lotteries shall be known as the Florida Education Lotteries. Net proceeds derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education Lotteries Trust Fund, to be appropriated by the Legislature. The schedule may be amended by general law.

**History.**—Proposed by Initiative Petition filed with the Secretary of State June 10, 1985; adopted 1986.

## ARTICLE XI

### AMENDMENTS

Sec.

1. Proposal by legislature.
2. Revision commission.
3. Initiative.
4. Constitutional convention.
5. Amendment or revision election.
6. Taxation and budget reform commission.

**SECTION 1. Proposal by legislature.**—Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

**SECTION 2. Revision commission.—**

(a) Within thirty days after the adjournment of the regular session of the legislature convened in the tenth year following that in which this constitution is adopted, and each twentieth year thereafter, there shall be

established a constitution revision commission composed of the following thirty-seven members:

- (1) the attorney general of the state;
- (2) fifteen members selected by the governor;
- (3) nine members selected by the speaker of the house of representatives and nine members selected by the president of the senate; and
- (4) three members selected by the chief justice of the supreme court of Florida with the advice of the justices.

(b) The governor shall designate one member of the commission as its chairman. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.

(c) Each constitution revision commission shall convene at the call of its chairman, adopt its rules of procedure, examine the constitution of the state, except for matters relating directly to taxation or the state budgetary process that are to be reviewed by the taxation and budget reform commission established in section 6, hold public hearings, and, not later than one hundred eighty days prior to the next general election, file with the secretary of state its proposal, if any, of a revision of this constitution or any part of it.

**History.**—Am. H.J.R. 1616, 1988; adopted 1988.

**SECTION 3. Initiative.**—The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the secretary of state a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

**History.**—Am. H.J.R. 2835, 1972; adopted 1972.

#### **SECTION 4. Constitutional convention.**—

(a) The power to call a convention to consider a revision of the entire constitution is reserved to the people. It may be invoked by filing with the secretary of state a petition, containing a declaration that a constitutional convention is desired, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to fifteen per cent of the votes cast in each such district respectively and in the state as a whole in the last preceding election of presidential electors.

(b) At the next general election held more than ninety days after the filing of such petition there shall be submitted to the electors of the state the question: "Shall a constitutional convention be held?" If a majority voting on the question votes in the affirmative, at the next succeeding general election there shall be elected from each representative district a member of a constitutional convention. On the twenty-first day following that election, the convention shall sit at the capital, elect officers, adopt rules of procedure, judge the election of its membership, and fix a time and place for its future meetings. Not later than ninety days before the next succeeding general election, the convention shall cause to be filed with the secretary of state any revision of this constitution proposed by it.

#### **SECTION 5. Amendment or revision election.—**

(a) A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the secretary of state, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature and limited to a single amendment or revision, it is submitted at an earlier special election held more than ninety days after such filing.

(b) Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published.

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

*History.*—Am. H.J.R. 1616, 1988; adopted 1988.

#### **SECTION 6. Taxation and budget reform commission.—**

(a) Beginning in 1990 and each tenth year thereafter, there shall be established a taxation and budget reform commission composed of the following members:

(1) eleven members selected by the governor, none of whom shall be a member of the legislature at the time of appointment.

(2) seven members selected by the speaker of the house of repre-

sentatives and seven members selected by the president of the senate, none of whom shall be a member of the legislature at the time of appointment.

(3) four non-voting ex officio members, all of whom shall be members of the legislature at the time of appointment. Two of these members, one of whom shall be a member of the minority party in the house of representatives, shall be selected by the speaker of the house of representatives, and two of these members, one of whom shall be a member of the minority party in the senate, shall be selected by the president of the senate.

(b) Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.

(c) At its initial meeting, the members of the commission shall elect a member who is not a member of the legislature to serve as chairman and the commission shall adopt its rules of procedure. Thereafter, the commission shall convene at the call of the chairman. An affirmative vote of two thirds of the full commission and the concurrence of a majority of the members appointed by the governor pursuant to paragraph (a)(1), a concurrence of a majority of the members appointed by the speaker of the house of representatives pursuant to paragraph (a)(2), and a concurrence of a majority of the members appointed by the president of the senate pursuant to paragraph (a)(2) shall be necessary for any revision of this constitution or any part of it to be proposed by the commission.

(d) The commission shall examine the state budgetary process, the revenue needs and expenditure processes of the state, the appropriateness of the tax structure of the state, and governmental productivity and efficiency; review policy as it relates to the ability of state and local government to tax and adequately fund governmental operations and capital facilities required to meet the state's needs during the next ten year period; determine methods favored by the citizens of the state to fund the needs of the state, including alternative methods for raising sufficient revenues for the needs of the state; determine measures that could be instituted to effectively gather funds from existing tax sources; examine constitutional limitations on taxation and expenditures at the state and local level; and review the state's comprehensive planning, budgeting and needs assessment processes to determine whether the resulting information adequately supports a strategic decision-making process.

(e) The commission shall hold public hearings as it deems necessary to carry out its responsibilities under this section. The commission shall issue a report of the results of the review carried out, and propose to the legislature any recommended statutory changes related to the taxation or budgetary laws of the state. Not later than one hundred eighty days prior to the general election in the second year following the year in which the

commission is established, the commission shall file with the secretary of state its proposal, if any, of a revision of this constitution or any part of it dealing with taxation or the state budgetary process.

*History.*—Added, H.J.R. 1616, 1988; adopted 1988.

## ARTICLE XII

### SCHEDULE

Sec.

1. Constitution of 1885 superseded.
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**SECTION 1. Constitution of 1885 superseded.**—Articles I through IV, VII, and IX through XX of the Constitution of Florida adopted in 1885, as amended from time to time, are superseded by this revision except those sections expressly retained and made a part of this revision by reference.

**SECTION 2. Property taxes; millages.**—Tax millages authorized in counties, municipalities and special districts, on the date this revision becomes effective, may be continued until reduced by law.

**SECTION 3. Officers to continue in office.**—Every person holding office when this revision becomes effective shall continue in office for the remainder of the term if that office is not abolished. If the office is abolished the incumbent shall be paid adequate compensation, to be fixed by law, for the loss of emoluments for the remainder of the term.

**SECTION 4. State commissioner of education.**—The state superintendent of public instruction in office on the effective date of this revision shall become and, for the remainder of the term being served, shall be the commissioner of education.

**SECTION 5. Superintendent of schools.**—

(a) On the effective date of this revision the county superintendent of public instruction of each county shall become and, for the remainder of the term being served, shall be the superintendent of schools of that district.

(b) The method of selection of the county superintendent of public instruction of each county, as provided by or under the Constitution of 1885, as amended, shall apply to the selection of the district superintendent of schools until changed as herein provided.

**SECTION 6. Laws preserved.**—

(a) All laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed.

(b) All statutes which, under the Constitution of 1885, as amended, apply to the state superintendent of public instruction and those which apply to the county superintendent of public instruction shall under this revision apply, respectively, to the state commissioner of education and the district superintendent of schools.

**SECTION 7. Rights reserved.**—

(a) All actions, rights of action, claims, contracts and obligations of individuals, corporations and public bodies or agencies existing on the date this revision becomes effective shall continue to be valid as if this revision had not been adopted. All taxes, penalties, fines and forfeitures owing to the state under the Constitution of 1885, as amended, shall inure to the state under this revision, and all sentences as punishment for crime shall be executed according to their terms.

(b) This revision shall not be retroactive so as to create any right or liability which did not exist under the Constitution of 1885, as amended, based upon matters occurring prior to the adoption of this revision.

**SECTION 8. Public debts recognized.**—All bonds, revenue certificates, revenue bonds and tax anticipation certificates issued pursuant to the Constitution of 1885, as amended by the state, any agency, political subdivision or public corporation of the state shall remain in full force and effect and shall be secured by the same sources of revenue as before the adoption of this revision, and, to the extent necessary to effectuate this section, the applicable provisions of the Constitution of 1885, as amended, are retained as a part of this revision until payment in full of these public securities.

**SECTION 9. Bonds.—**

**(a) ADDITIONAL SECURITIES.**

(1) <sup>1</sup>Article IX, Section 17, of the Constitution of 1885, as amended, as it existed immediately before this Constitution, as revised in 1968, became effective, is adopted by this reference as a part of this revision as completely as though incorporated herein verbatim, except revenue bonds, revenue certificates or other evidences of indebtedness hereafter issued thereunder may be issued by the agency of the state so authorized by law.

(2) That portion of <sup>2</sup>Article XII, Section 9, Subsection (a) of this Constitution, as amended, which by reference adopted <sup>3</sup>Article XII, Section 19 of the Constitution of 1885, as amended, as the same existed immediately before the effective date of this amendment is adopted by this reference as part of this revision as completely as though incorporated herein verbatim, for the purpose of providing that after the effective date of this amendment all of the proceeds of the revenues derived from the gross receipts taxes, as therein defined, collected in each year shall be applied as provided therein to the extent necessary to comply with all obligations to or for the benefit of holders of bonds or certificates issued before the effective date of this amendment or any refundings thereof which are secured by such gross receipts taxes. No bonds or other obligations may be issued pursuant to the provisions of <sup>3</sup>Article XII, Section 19, of the Constitution of 1885, as amended, but this provision shall not be construed to prevent the refunding of any such outstanding bonds or obligations pursuant to the provisions of this subsection (a)(2).

Subject to the requirements of the first paragraph of this subsection (a)(2), beginning July 1, 1975, all of the proceeds of the revenues derived from the gross receipts taxes collected from every person, including municipalities, as provided and levied pursuant to the provisions of chapter 203, Florida Statutes, as such chapter is amended from time to time, shall, as collected, be placed in a trust fund to be known as the “public education capital outlay and debt service trust fund” in the state treasury (hereinafter



referred to as "capital outlay fund"), and used only as provided herein.

The capital outlay fund shall be administered by the state board of education as created and constituted by Section 2 of Article IX of the Constitution of Florida as revised in 1968 (hereinafter referred to as "state board"), or by such other instrumentality of the state which shall hereafter succeed by law to the powers, duties and functions of the state board, including the powers, duties and functions of the state board provided in this subsection (a)(2). The state board shall be a body corporate and shall have all the powers provided herein in addition to all other constitutional and statutory powers related to the purposes of this subsection (a)(2) heretofore or hereafter conferred by law upon the state board, or its predecessor created by the Constitution of 1885, as amended.

State bonds pledging the full faith and credit of the state may be issued, without a vote of the electors, by the state board pursuant to law to finance or refinance capital projects theretofore authorized by the legislature, and any purposes appurtenant or incidental thereto, for the state system of public education provided for in Section 1 of Article IX of this Constitution (hereinafter referred to as "state system"), including but not limited to institutions of higher learning, community colleges, vocational technical schools, or public schools, as now defined or as may hereafter be defined by law. All such bonds shall mature not later than thirty years after the date of issuance thereof. All other details of such bonds shall be as provided by law or by the proceedings authorizing such bonds; provided, however, that no bonds, except refunding bonds, shall be issued, and no proceeds shall be expended for the cost of any capital project, unless such project has been authorized by the legislature.

Bonds issued pursuant to this subsection (a)(2) shall be primarily payable from such revenues derived from gross receipts taxes, and shall be additionally secured by the full faith and credit of the state. No such bonds shall ever be issued in an amount exceeding ninety percent of the amount which the state board determines can be serviced by the revenues derived from the gross receipts taxes accruing thereafter under the provisions of this subsection (a)(2), and such determination shall be conclusive.

The moneys in the capital outlay fund in each fiscal year shall be used only for the following purposes and in the following order of priority:

- a. For the payment of the principal of and interest on any bonds due in such fiscal year;
- b. For the deposit into any reserve funds provided for in the proceedings authorizing the issuance of bonds of any amounts required to be deposited in such reserve funds in such fiscal year;
- c. For direct payment of the cost or any part of the cost of any

capital project for the state system theretofore authorized by the legislature, or for the purchase or redemption of outstanding bonds in accordance with the provisions of the proceedings which authorized the issuance of such bonds, or for the purpose of maintaining, restoring, or repairing existing public educational facilities.

(b) **REFUNDING BONDS.** Revenue bonds to finance the cost of state capital projects issued prior to the date this revision becomes effective, including projects of the Florida state turnpike authority or its successor but excluding all portions of the state highway system, may be refunded as provided by law without vote of the electors at a lower net average interest cost rate by the issuance of bonds maturing not later than the obligations refunded, secured by the same revenues only.

(c) **MOTOR VEHICLE FUEL TAXES.**

(1) A state tax, designated "second gas tax," of two cents per gallon upon gasoline and other like products of petroleum and an equivalent tax upon other sources of energy used to propel motor vehicles as levied by <sup>4</sup>Article IX, Section 16, of the Constitution of 1885, as amended, is hereby continued. The proceeds of said tax shall be placed monthly in the state roads distribution fund in the state treasury.

(2) <sup>4</sup>Article IX, Section 16, of the Constitution of 1885, as amended, is adopted by this reference as a part of this revision as completely as though incorporated herein verbatim for the purpose of providing that after the effective date of this revision the proceeds of the "second gas tax" as referred to therein shall be allocated among the several counties in accordance with the formula stated therein to the extent necessary to comply with all obligations to or for the benefit of holders of bonds, revenue certificates and tax anticipation certificates or any refundings thereof secured by any portion of the "second gas tax."

(3) No funds anticipated to be allocated under the formula stated in <sup>4</sup>Article IX, Section 16, of the Constitution of 1885, as amended, shall be pledged as security for any obligation hereafter issued or entered into, except that any outstanding obligations previously issued pledging revenues allocated under said <sup>4</sup>Article IX, Section 16, may be refunded at a lower average net interest cost rate by the issuance of refunding bonds, maturing not later than the obligations refunded, secured by the same revenues and any other security authorized in paragraph (5) of this subsection.

(4) Subject to the requirements of paragraph (2) of this subsection and after payment of administrative expenses, the "second gas tax" shall be allocated to the account of each of the several counties in the amounts to be determined as follows: There shall be an initial allocation of one-fourth in the ratio of county area to state area, one-fourth in the ratio of the total

county population to the total population of the state in accordance with the latest available federal census, and one-half in the ratio of the total "second gas tax" collected on retail sales or use in each county to the total collected in all counties of the state during the previous fiscal year. If the annual debt service requirements of any obligations issued for any county, including any deficiencies for prior years, secured under paragraph (2) of this subsection, exceeds the amount which would be allocated to that county under the formula set out in this paragraph, the amounts allocated to other counties shall be reduced proportionately.

(5) Funds allocated under paragraphs (2) and (4) of this subsection shall be administered by the state board of administration created under said <sup>4</sup>Article IX, Section 16, of the Constitution of 1885, as amended, and which is continued as a body corporate for the life of this subsection 9(c). The board shall remit the proceeds of the "second gas tax" in each county account for use in said county as follows: eighty per cent to the state agency supervising the state road system and twenty per cent to the governing body of the county. The percentage allocated to the county may be increased by general law. The proceeds of the "second gas tax" subject to allocation to the several counties under this paragraph (5) shall be used first, for the payment of obligations pledging revenues allocated pursuant to <sup>4</sup>Article IX, Section 16, of the Constitution of 1885, as amended, and any refundings thereof; second, for the payment of debt service on bonds issued as provided by this paragraph (5) to finance the acquisition and construction of roads as defined by law; and third, for the acquisition and construction of roads and for road maintenance as authorized by law. When authorized by law, state bonds pledging the full faith and credit of the state may be issued without any election: (i) to refund obligations secured by any portion of the "second gas tax" allocated to a county under <sup>4</sup>Article IX, Section 16, of the Constitution of 1885, as amended; (ii) to finance the acquisition and construction of roads in a county when approved by the governing body of the county and the state agency supervising the state road system; and (iii) to refund obligations secured by any portion of the "second gas tax" allocated under paragraph 9(c)(4). No such bonds shall be issued unless a state fiscal agency created by law has made a determination that in no state fiscal year will the debt service requirements of the bonds and all other bonds secured by the pledged portion of the "second gas tax" allocated to the county exceed seventy-five per cent of the pledged portion of the "second gas tax" allocated to that county for the preceding state fiscal year, of the pledged net tolls from existing facilities collected in the preceding state fiscal year, and of the annual average net tolls anticipated during the first five state fiscal years of operation of new projects to be financed, and of any other legally

available pledged revenues collected in the preceding state fiscal year. Bonds issued pursuant to this subsection shall be payable primarily from the pledged tolls, the pledged portions of the “second gas tax” allocated to that county, and any other pledged revenue, and shall mature not later than forty years from the date of issuance.

(d) SCHOOL BONDS.

(1) <sup>5</sup>Article XII, Section 9, Subsection (d) of this constitution, as amended, (which, by reference, adopted <sup>6</sup>Article XII, Section 18, of the Constitution of 1885, as amended) as the same existed immediately before the effective date of this amendment is adopted by this reference as part of this amendment as completely as though incorporated herein verbatim, for the purpose of providing that after the effective date of this amendment the first proceeds of the revenues derived from the licensing of motor vehicles as referred to therein shall be distributed annually among the several counties in the ratio of the number of instruction units in each county, the same being coterminus with the school district of each county as provided in Article IX, Section 4, Subsection (a) of this constitution, in each year computed as provided therein to the extent necessary to comply with all obligations to or for the benefit of holders of bonds or motor vehicle tax anticipation certificates issued before the effective date of this amendment or any refundings thereof which are secured by any portion of such revenues derived from the licensing of motor vehicles.

(2) No funds anticipated to be distributed annually among the several counties under the formula stated in <sup>5</sup>Article XII, Section 9, Subsection (d) of this constitution, as amended, as the same existed immediately before the effective date of this amendment shall be pledged as security for any obligations hereafter issued or entered into, except that any outstanding obligations previously issued pledging such funds may be refunded by the issuance of refunding bonds.

(3) Subject to the requirements of paragraph (1) of this subsection (d) beginning July 1, 1973, the first proceeds of the revenues derived from the licensing of motor vehicles (hereinafter called “motor vehicle license revenues”) to the extent necessary to comply with the provisions of this amendment, shall, as collected, be placed monthly in the school district and community college district capital outlay and debt service fund in the state treasury and used only as provided in this amendment. Such revenue shall be distributed annually among the several school districts and community college districts in the ratio of the number of instruction units in each school district or community college district in each year computed as provided herein. The amount of the first motor vehicle license revenues to be so set aside in each year and distributed as provided herein shall be an amount

equal in the aggregate to the product of six hundred dollars (\$600) multiplied by the total number of instruction units in all the school districts of Florida for the school fiscal year 1967-68, plus an amount equal in the aggregate to the product of eight hundred dollars (\$800) multiplied by the total number of instruction units in all the school districts of Florida for the school fiscal year 1972-73 and for each school fiscal year thereafter which is in excess of the total number of such instruction units in all the school districts of Florida for the school fiscal year 1967-68, such excess units being designated "growth units." The amount of the first motor vehicle license revenues to be so set aside in each year and distributed as provided herein shall additionally be an amount equal in the aggregate to the product of four hundred dollars (\$400) multiplied by the total number of instruction units in all community college districts of Florida. The number of instruction units in each school district or community college district in each year for the purposes of this amendment shall be the greater of (1) the number of instruction units in each school district for the school fiscal year 1967-68 or community college district for the school fiscal year 1968-69 computed in the manner heretofore provided by general law, or (2) the number of instruction units in such school district, including growth units, or community college district for the school fiscal year computed in the manner heretofore or hereafter provided by general law and approved by the state board of education (hereinafter called the state board), or (3) the number of instruction units in each school district, including growth units, or community college district on behalf of which the state board has issued bonds or motor vehicle license revenue anticipation certificates under this amendment which will produce sufficient revenues under this amendment to equal one and twelve-hundredths (1.12) times the aggregate amount of principal of and interest on all bonds or motor vehicle license revenue anticipation certificates issued under this amendment which will mature and become due in such year, computed in the manner heretofore or hereafter provided by general law and approved by the state board.

(4) Such funds so distributed shall be administered by the state board as now created and constituted by Section 2 of Article IX of the State Constitution as revised in 1968, or by such other instrumentality of the state which shall hereafter succeed by law to the powers, duties and functions of the state board, including the powers, duties and functions of the state board provided in this amendment. For the purposes of this amendment, said state board shall be a body corporate and shall have all the powers provided in this amendment in addition to all other constitutional and statutory powers related to the purposes of this amendment heretofore or hereafter conferred upon said state board.

(5) The state board shall, in addition to its other constitutional and statutory powers, have the management, control and supervision of the proceeds of the first motor vehicle license revenues provided for in this subsection (d). The state board shall also have power, for the purpose of obtaining funds for the use of any school board of any school district or board of trustees of any community college district in acquiring, building, constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating, or repairing of capital outlay projects for school purposes to issue bonds or motor vehicle license revenue anticipation certificates, and also to issue such bonds or motor vehicle license revenue anticipation certificates to pay, fund or refund any bonds or motor vehicle license revenue anticipation certificates theretofore issued by said state board. All such bonds or motor vehicle license revenue anticipation certificates shall bear interest at not exceeding the rate provided by general law and shall mature not later than thirty years after the date of issuance thereof. The state board shall have power to determine all other details of the bonds or motor vehicle license revenue anticipation certificates and to sell in the manner provided by general law, or exchange the bonds or motor vehicle license revenue anticipation certificates, upon such terms and conditions as the state board shall provide.

(6) The state board shall also have power to pledge for the payment of the principal of and interest on such bonds or motor vehicle license revenue anticipation certificates, including refunding bonds or refunding motor vehicle license revenue anticipation certificates, all or any part from the motor vehicle license revenues provided for in this amendment and to enter into any covenants and other agreements with the holders of such bonds or motor vehicle license revenue anticipation certificates at the time of the issuance thereof concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

(7) No such bonds or motor vehicle license revenue anticipation certificates shall ever be issued by the state board, except to refund outstanding bonds or motor vehicle license revenue anticipation certificates, until after the adoption of a resolution requesting the issuance thereof by the school board of the school district or board of trustees of the community college district on behalf of which the obligations are to be issued. The state board of education shall limit the amount of such bonds or motor vehicle license revenue anticipation certificates which can be issued on behalf of any school district or community college district to ninety percent (90%) of the amount which it determines can be serviced by the revenue accruing to

the school district or community college district under the provisions of this amendment, and shall determine the reasonable allocation of the interest savings from the issuance of refunding bonds or motor vehicle license revenue anticipation certificates, and such determinations shall be conclusive. All such bonds or motor vehicle license revenue anticipation certificates shall be issued in the name of the state board of education but shall be issued for and on behalf of the school board of the school district or board of trustees of the community college district requesting the issuance thereof, and no election or approval of qualified electors shall be required for the issuance thereof.

(8) The state board shall in each year use the funds distributable pursuant to this amendment to the credit of each school district or community college district only in the following manner and in order of priority:

a. To comply with the requirements of paragraph (1) of this subsection (d).

b. To pay all amounts of principal and interest due in such year on any bonds or motor vehicle license revenue anticipation certificates issued under the authority hereof, including refunding bonds or motor vehicle license revenue anticipation certificates, issued on behalf of the school board of such school district or board of trustees of such community college district; subject, however, to any covenants or agreements made by the state board concerning the rights between holders of different issues of such bonds or motor vehicle license revenue anticipation certificates, as herein authorized.

c. To establish and maintain a sinking fund or funds to meet future requirements for debt service or reserves therefor, on bonds or motor vehicle license revenue anticipation certificates issued on behalf of the school board of such school district or board of trustees of such community college district under the authority hereof, whenever the state board shall deem it necessary or advisable, and in such amounts and under such terms and conditions as the state board shall in its discretion determine.

d. To distribute annually to the several school boards of the school districts or the boards of trustees of the community college districts for use in payment of debt service on bonds heretofore or hereafter issued by any such school boards of the school districts or boards of trustees of the community college districts where the proceeds of the bonds were used, or are to be used, in the acquiring, building, constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating, or repairing of capital outlay projects in such school districts or community college districts and which capital outlay projects have been approved by the school board of the school district or board of trustees of the community

college district, pursuant to the most recent survey or surveys conducted under regulations prescribed by the state board to determine the capital outlay needs of the school district or community college district. The state board shall have power at the time of issuance of any bonds by any school board of any school district or board of trustees of any community college district to covenant and agree with such school board or board of trustees as to the rank and priority of payments to be made for different issues of bonds under this subparagraph d., and may further agree that any amounts to be distributed under this subparagraph d. may be pledged for the debt service on bonds issued by any school board of any school district or board of trustees of any community college district and for the rank and priority of such pledge. Any such covenants or agreements of the state board may be enforced by any holders of such bonds in any court of competent jurisdiction.

e. To pay the expenses of the state board in administering this subsection (d), which shall be prorated among the various school districts and community college districts and paid out of the proceeds of the bonds or motor vehicle license revenue anticipation certificates or from the funds distributable to each school district and community college district on the same basis as such motor vehicle license revenues are distributable to the various school districts and community college districts.

f. To distribute annually to the several school boards of the school districts or boards of trustees of the community college districts for the payment of the cost of acquiring, building, constructing, altering, remodeling, improving, enlarging, furnishing, equipping, maintaining, renovating, or repairing of capital outlay projects for school purposes in such school district or community college district as shall be requested by resolution of the school board of the school district or board of trustees of the community college district.

g. When all major capital outlay needs of a school district or community college district have been met as determined by the state board, on the basis of a survey made pursuant to regulations of the state board and approved by the state board, all such funds remaining shall be distributed annually and used for such school purposes in such school district or community college district as the school board of the school district or board of trustees of the community college district shall determine, or as may be provided by general law.

(9) Capital outlay projects of a school district or community college district shall be eligible to participate in the funds accruing under this amendment and derived from the proceeds of bonds and motor vehicle license revenue anticipation certificates and from the motor vehicle license



revenues, only in the order of priority of needs, as shown by a survey or surveys conducted in the school district or community college district under regulations prescribed by the state board, to determine the capital outlay needs of the school district or community college district and approved by the state board; provided that the priority of such projects may be changed from time to time upon the request of the school board of the school district or board of trustees of the community college district and with the approval of the state board; and provided, further, that this paragraph (9) shall not in any manner affect any covenant, agreement or pledge made by the state board in the issuance by said state board of any bonds or motor vehicle license revenue anticipation certificates, or in connection with the issuance of any bonds of any school board of any school district or board of trustees of any community college district.

(10) The state board shall have power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this amendment of full force and operating effect. The legislature shall not reduce the levies of said motor vehicle license revenues during the life of this amendment to any degree which will fail to provide the full amount necessary to comply with the provisions of this amendment and pay the necessary expenses of administering the laws relating to the licensing of motor vehicles, and shall not enact any law having the effect of withdrawing the proceeds of such motor vehicle license revenues from the operation of this amendment and shall not enact any law impairing or materially altering the rights of the holders of any bonds or motor vehicle license revenue anticipation certificates issued pursuant to this amendment or impairing or altering any covenant or agreement of the state board, as provided in such bonds or motor vehicle license revenue anticipation certificates.

(11) Bonds issued by the state board pursuant to this subsection (d) shall be payable primarily from said motor vehicle license revenues as provided herein, and if heretofore or hereafter authorized by law, may be additionally secured by pledging the full faith and credit of the state without an election. When heretofore or hereafter authorized by law, bonds issued pursuant to Article XII, Section 18 of the Constitution of 1885, as amended prior to 1968, and bonds issued pursuant to Article XII, Section 9, subsection (d) of the Constitution as revised in 1968, and bonds issued pursuant to this subsection (d), may be refunded by the issuance of bonds additionally secured by the full faith and credit of the state.

(e) **DEBT LIMITATION.** Bonds issued pursuant to this Section 9 of Article XII which are payable primarily from revenues pledged pursuant to this section shall not be included in applying the limits upon the amount of

state bonds contained in Section 11, Article VII, of this revision.

**History.**—Am. H.J.R. 1851, 1969; adopted 1969; Am. C.S. for S.J.R. 292, 1972, and Am. C.S. for H.J.R. 3576, 1972; adopted 1972; Am. C.S. for H.J.R.'s 2289, 2984, 1974; adopted 1974; Am. S.J.R. 824, 1980; adopted 1980; Am. S.J.R. 1157, 1984; adopted 1984; Am. proposed by Taxation and Budget Reform Commission, Revision No. 1, 1992, filed with the Secretary of State May 7, 1992; adopted 1992; Am. S.J.R. 2-H, 1992; adopted 1992.

<sup>1</sup>**Note.**—Section 17 of Art. IX of the Constitution of 1885, as amended, reads as follows:

SECTION 17. Bonds; land acquisition for outdoor recreation development.—The outdoor recreational development council, as created by the 1963 legislature, may issue revenue bonds, revenue certificates or other evidences of indebtedness to acquire lands, water areas and related resources and to construct, improve, enlarge and extend capital improvements and facilities thereon in furtherance of outdoor recreation, natural resources conservation and related facilities in this state; provided, however, the legislature with respect to such revenue bonds, revenue certificates or other evidences of indebtedness shall designate the revenue or tax sources to be deposited in or credited to the land acquisition trust fund for their repayment and may impose restrictions on their issuance, including the fixing of maximum interest rates and discounts.

The land acquisition trust fund, created by the 1963 legislature for these multiple public purposes, shall continue from the date of the adoption of this amendment for a period of fifty years.

In the event the outdoor recreational development council shall determine to issue bonds for financing acquisition of sites for multiple purposes the state board of administration shall act as fiscal agent, and the attorney general shall handle the validation proceedings.

All bonds issued under this amendment shall be sold at public sale after public advertisement upon such terms and conditions as the outdoor recreational development council shall provide and as otherwise provided by law and subject to the limitations herein imposed.

**History.**—S.J.R. 727, 1963; adopted 1963.

<sup>2</sup>**Note.**—Prior to its amendment by C.S. for H.J.R.'s 2289, 2984, 1974, subsection (a) read as follows:

(a) **ADDITIONAL SECURITIES.** Article IX, Section 17, of the Constitution of 1885, as amended, as it existed immediately before this Constitution, as revised in 1968, became effective, is adopted by this reference as a part of this revision as completely as though incorporated herein verbatim, except revenue bonds, revenue certificates or other evidences of indebtedness hereafter issued thereunder may be issued by the agency of the state so authorized by law.

Article XII, Section 19, of the Constitution of 1885, as amended, as it existed immediately before this revision becomes effective, is adopted by this reference as a part of this revision as completely as though incorporated herein verbatim, except bonds or tax anticipation certificates hereafter issued thereunder may bear interest not in excess of five percent (5%) per annum or such higher interest as may be authorized by statute passed by a three-fifths (3/5) vote of each house of the legislature. No revenue bonds or tax anticipation certificates shall be issued pursuant thereto after June 30, 1975.

<sup>3</sup>**Note.**—Section 19 of Art. XII of the Constitution of 1885, as amended, reads as follows:

SECTION 19. Institutions of higher learning and junior college capital outlay trust fund bonds.—

(a) That beginning January 1, 1964, and for fifty years thereafter, all of the proceeds of the revenues derived from the gross receipts taxes collected from every person, including municipalities, receiving payment for electricity for light, heat or power, for natural or manufactured gas for light, heat or power, for use of telephones and for the sending of telegrams and telegraph messages, as now provided and levied as of the time of adoption of this amendment in Chapter 203, Florida Statutes (hereinafter called "Gross Receipts Taxes"), shall, as collected be placed in a trust fund to be known as the "Institutions of Higher Learning and Junior Colleges Capital Outlay and Debt Service Trust Fund" in the State Treasury (hereinafter referred to as "Capital Outlay Fund"), and used only as provided in this Amendment.

Said fund shall be administered by the State Board of Education, as now created and constituted by

Section 3 of Article XII [now s. 2, Article IX] of the Constitution of Florida (hereinafter referred to as "State Board"). For the purpose of this Amendment, said State Board, as now constituted, shall continue as a body corporate during the life of this Amendment and shall have all the powers provided in this Amendment in addition to all other constitutional and statutory powers related to the purposes of this Amendment heretofore or hereafter conferred by law upon said State Board.

(b) The State Board shall have power, for the purpose of obtaining funds for acquiring, building, constructing, altering, improving, enlarging, furnishing or equipping capital outlay projects theretofore authorized by the legislature and any purposes appurtenant or incidental thereto, for Institutions of Higher Learning or Junior Colleges, as now defined or as may be hereafter defined by law, and for the purpose of constructing buildings and other permanent facilities for vocational technical schools as provided in chapter 230 Florida Statutes, to issue bonds or certificates, including refunding bonds or certificates to fund or refund any bonds or certificates theretofore issued. All such bonds or certificates shall bear interest at not exceeding four and one-half per centum per annum, and shall mature at such time or times as the State Board shall determine not exceeding, in any event, however, thirty years from the date of issuance thereof. The State Board shall have power to determine all other details of such bonds or certificates and to sell at public sale, after public advertisement, such bonds or certificates, provided, however, that no bonds or certificates shall ever be issued hereunder to finance, or the proceeds thereof expended for, any part of the cost of any capital outlay project unless the construction or acquisition of such capital outlay project has been theretofore authorized by the Legislature of Florida. None of said bonds or certificates shall be sold at less than ninety-eight per centum of the par value thereof, plus accrued interest, and said bonds or certificates shall be awarded at the public sale thereof to the bidder offering the lowest net interest cost for such bonds or certificates in the manner to be determined by the State Board.

The State Board shall also have power to pledge for the payment of the principal of and interest on such bonds or certificates, and reserves therefor, including refunding bonds or certificates, all or any part of the revenue to be derived from the said Gross Receipts Taxes provided for in this Amendment, and to enter into any covenants and other agreements with the holders of such bonds or certificates concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

No such bonds or certificates shall ever be issued by the State Board in an amount exceeding seventy-five per centum of the amount which it determines, based upon the average annual amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding two fiscal years, or the amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding fiscal year, as shown in a certificate filed by the State Comptroller with the State Board prior to the issuance of such bonds or certificates, whichever is the lesser, can be serviced by the revenues accruing thereafter under the provisions of this Amendment; nor shall the State Board, during the first year following the ratification of this amendment, issue bonds or certificates in excess of seven times the anticipated revenue from said Gross Receipts Taxes during said year, nor during each succeeding year, more than four times the anticipated revenue from said Gross Receipts Taxes during such year. No election or approval of qualified electors or freeholder electors shall be required for the issuance of bonds or certificates hereunder.

After the initial issuance of any bonds or certificates pursuant to this Amendment, the State Board may thereafter issue additional bonds or certificates which will rank equally and on a parity, as to lien on and source of security for payment from said Gross Receipts Taxes, with any bonds or certificates theretofore issued pursuant to this Amendment, but such additional parity bonds or certificates shall not be issued unless the average annual amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding two fiscal years, or the amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding fiscal year, as shown in a certificate filed by the State Comptroller with the State Board prior to the issuance of such bonds or certificates, whichever is the lesser, shall have been equal to one and one-third times the aggregate amount of principal and interest which will become due in any succeeding fiscal year on all bonds or certificates theretofore issued pursuant to this Amendment and then outstanding, and the additional parity bonds or certificates then proposed to be issued. No bonds, certificates or other obligations whatsoever shall at any time be issued

under the provisions of this Amendment, except such bonds or certificates initially issued hereunder, and such additional parity bonds or certificates as provided in this paragraph. Notwithstanding any other provision herein no such bonds or certificates shall be authorized or validated during any biennium in excess of fifty million dollars, except by two-thirds vote of the members elected to each house of the legislature; provided further that during the biennium 1963-1965 seventy-five million dollars may be authorized and validated pursuant hereto.

(c) Capital outlay projects theretofore authorized by the legislature for any Institution of Higher Learning or Junior College shall be eligible to participate in the funds accruing under this Amendment derived from the proceeds of bonds or certificates and said Gross Receipts Taxes under such regulations and in such manner as shall be determined by the State Board, and the State Board shall use or transmit to the State Board of Control or to the Board of Public Instruction of any County authorized by law to construct or acquire such capital outlay projects, the amount of the proceeds of such bonds or certificates or Gross Receipts Taxes to be applied to or used for such capital outlay projects. If for any reason any of the proceeds of any bonds or certificates issued for any capital outlay project shall not be expended for such capital outlay project, the State Board may use such unexpended proceeds for any other capital outlay project for Institutions of Higher Learning or Junior Colleges and vocational technical schools, as defined herein, as now defined or as may be hereafter defined by law, theretofore authorized by the State Legislature. The holders of bonds or certificates issued hereunder shall not have any responsibility whatsoever for the application or use of any of the proceeds derived from the sale of said bonds or certificates, and the rights and remedies of the holders of such bonds or certificates and their right to payment from said Gross Receipts Taxes in the manner provided herein shall not be affected or impaired by the application or use of such proceeds.

The State Board shall use the moneys in said Capital Outlay Fund in each fiscal year only for the following purposes and in the following order of priority:

(1) For the payment of the principal of and interest on any bonds or certificates maturing in such fiscal year.

(2) For the deposit into any reserve funds provided for in the proceedings authorizing the issuance of said bonds or certificates, of any amounts required to be deposited in such reserve funds in such fiscal year.

(3) After all payments required in such fiscal year for the purposes provided for in (1) and (2) above, including any deficiencies for required payments in prior fiscal years, any moneys remaining in said Capital Outlay Fund at the end of such fiscal year may be used by the State Board for direct payment of the cost or any part of the cost of any capital outlay project theretofore authorized by the legislature or for the purchase of any bonds or certificates issued hereunder then outstanding upon such terms and conditions as the State Board shall deem proper, or for the prior redemption of outstanding bonds or certificates in accordance with the provisions of the proceedings which authorized the issuance of such bonds or certificates.

The State Board may invest the moneys in said Capital Outlay Fund or in any sinking fund or other funds created for any issue of bonds or certificates, in direct obligations of the United States of America or in the other securities referred to in Section 344.27, Florida Statutes.

(d) The State Board shall have the power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this Amendment of full force and operating effect on and after January 1, 1964. The Legislature, during the period this Amendment is in effect, shall not reduce the rate of said Gross Receipts Taxes now provided in said Chapter 203, Florida Statutes, or eliminate, exempt or remove any of the persons, firms or corporations, including municipal corporations, or any of the utilities, businesses or services now or hereafter subject to said Gross Receipts Taxes, from the levy and collection of said Gross Receipts Taxes as now provided in said Chapter 203, Florida Statutes, and shall not enact any law impairing or materially altering the rights of the holders of any bonds or certificates issued pursuant to this Amendment or impairing or altering any covenants or agreements of the State Board made hereunder, or having the effect of withdrawing the proceeds of said Gross Receipts Taxes from the operation of this Amendment.

The State Board of Administration shall be and is hereby constituted as the Fiscal Agent of the State Board to perform such duties and assume such responsibilities under this Amendment as shall be agreed

upon between the State Board and such State Board of Administration. The State Board shall also have power to appoint such other persons and fix their compensation for the administration of the provisions of this Amendment as it shall deem necessary, and the expenses of the State Board in administering the provisions of this Amendment shall be paid out of the proceeds of bonds or certificates issued hereunder or from said Gross Receipts Taxes deposited in said Capital Outlay Fund.

(e) No capital outlay project or any part thereof shall be financed hereunder unless the bill authorizing such project shall specify it is financed hereunder and shall be approved by a vote of three-fifths of the elected members of each house.

**History.**—S.J.R. 264, 1963; adopted 1963.

**\*Note.**—Section 16 of Art. IX of the Constitution of 1885, as amended, reads as follows:

SECTION 16. Board of administration; gasoline and like taxes, distribution and use; etc.--(a) That beginning January 1st, 1943, and for fifty (50) years thereafter, the proceeds of two (2¢) cents per gallon of the total tax levied by state law upon gasoline and other like products of petroleum, now known as the Second Gas Tax, and upon other fuels used to propel motor vehicles, shall as collected be placed monthly in the 'State Roads Distribution Fund' in the State Treasury and divided into three (3) equal parts which shall be distributed monthly among the several counties as follows: one part according to area, one part according to population, and one part according to the counties' contributions to the cost of state road construction in the ratio of distribution as provided in Chapter 15659, Laws of Florida, Acts of 1931, and for the purposes of the apportionment based on the counties' contributions for the cost of state road construction, the amount of the contributions established by the certificates made in 1931 pursuant to said Chapter 15659, shall be taken and deemed conclusive in computing the monthly amounts distributable according to said contributions. Such funds so distributed shall be administered by the State Board of Administration as hereinafter provided.

(b) The Governor as chairman, the State Treasurer, and the State Comptroller shall constitute a body corporate to be known as the 'State Board of Administration,' which board shall succeed to all the power, control and authority of the statutory Board of Administration. Said Board shall have, in addition to such powers as may be conferred upon it by law, the management, control and supervision of the proceeds of said two (2¢) cents of said taxes and all moneys and other assets which on the effective date of this amendment are applicable or may become applicable to the bonds of the several counties of this state, or any special road and bridge district, or other special taxing district thereof, issued prior to July 1st, 1931, for road and bridge purposes. The word 'bonds' as used herein shall include bonds, time warrants, notes and other forms of indebtedness issued for road and bridge purposes by any county or special road and bridge district or other special taxing district, outstanding on July 1st, 1931, or any refunding issues thereof. Said Board shall have the statutory powers of Boards of County Commissioners and Bond Trustees and of any other authority of special road and bridge districts, and other special taxing districts thereof with regard to said bonds, (except that the power to levy ad valorem taxes is expressly withheld from said Board), and shall take over all papers, documents and records concerning the same. Said Board shall have the power from time to time to issue refunding bonds to mature within the said fifty (50) year period, for any of said outstanding bonds or interest thereon, and to secure them by a pledge of anticipated receipts from such gasoline or other fuel taxes to be distributed to such county as herein provided, but not at a greater rate of interest than said bonds now bear; and to issue, sell or exchange on behalf of any county or unit for the sole purpose of retiring said bonds issued by such county, or special road and bridge district, or other special taxing district thereof, gasoline or other fuel tax anticipation certificates bearing interest at not more than three (3) per cent per annum in such denominations and maturing at such time within the fifty (50) year period as the board may determine. In addition to exercising the powers now provided by statute for the investment of sinking funds, said Board may use the sinking funds created for said bonds of any county or special road and bridge district, or other unit hereunder, to purchase the matured or maturing bonds participating herein of any other county or any other special road and bridge district, or other special taxing district thereof, provided that as to said matured bonds, the value thereof as an investment shall be the price paid therefor, which shall not exceed the par value plus accrued interest, and that said investment shall bear interest at the rate of three (3) per cent per annum.

(c) The said board shall annually use said funds in each county account, first, to pay current

principal and interest maturing, if any, of said bonds and gasoline or other fuel tax anticipation certificates of such county or special road and bridge district, or other special taxing district thereof; second, to establish a sinking fund account to meet future requirements of said bonds and gasoline or other fuel tax anticipation certificates where it appears the anticipated income for any year or years will not equal scheduled payments thereon; and third, any remaining balance out of the proceeds of said two (2¢) cents of said taxes shall monthly during the year be remitted by said board as follows: Eighty (80%) per cent to the State Road Department for the construction or reconstruction of state roads and bridges within the county, or for the lease or purchase of bridges connecting state highways within the county, and twenty (20%) per cent to the Board of County Commissioners of such county for use on roads and bridges therein.

(d) Said board shall have the power to make and enforce all rules and regulations necessary to the full exercise of the powers hereby granted and no legislation shall be required to render this amendment of full force and operating effect from and after January 1st, 1943. The Legislature shall continue the levies of said taxes during the life of this Amendment, and shall not enact any law having the effect of withdrawing the proceeds of said two (2¢) cents of said taxes from the operation of this amendment. The board shall pay refunding expenses and other expenses for services rendered specifically for, or which are properly chargeable to, the account of any county from funds distributed to such county; but general expenses of the board for services rendered all the counties alike shall be prorated among them and paid out of said funds on the same basis said tax proceeds are distributed among the several counties; provided, report of said expenses shall be made to each Regular Session of the Legislature, and the Legislature may limit the expenses of the board.

**History.**—Added, S.J.R. 324, 1941; adopted 1942.

<sup>5</sup>**Note.**—Prior to its amendment by C.S. for H.J.R. 3576, 1972, subsection (d) read as follows:

(d) **SCHOOL BONDS.** Article XII, Section 18, of the Constitution of 1885, as amended, as it existed immediately before this revision becomes effective is adopted by this reference as part of this revision as completely as though incorporated herein verbatim, except bonds or tax anticipation certificates hereafter issued thereunder may bear interest not in excess of five per cent per annum or such higher interest as may be authorized by statute passed by a three-fifths vote of each house of the legislature. Bonds issued pursuant to this subsection (d) shall be payable primarily from revenues as provided in Article XII, Section 18, of the Constitution of 1885, as amended, and if authorized by law, may be additionally secured by pledging the full faith and credit of the state without an election. When authorized by law, bonds issued pursuant to Article XII, Section 18, of the Constitution of 1885, as amended, and bonds issued pursuant to this subsection (d), may be refunded by the issuance of bonds additionally secured by the full faith and credit of the state only at a lower net average interest cost rate.

<sup>6</sup>**Note.**—Section 18, Art. XII of the Constitution of 1885, as amended, reads as follows:

**SECTION 18.** School bonds for capital outlay, issuance.—

(a) Beginning January 1, 1965 and for thirty-five years thereafter, the first proceeds of the revenues derived from the licensing of motor vehicles to the extent necessary to comply with the provisions of this amendment, shall, as collected, be placed monthly in the county capital outlay and debt service school fund in the state treasury, and used only as provided in this amendment. Such revenue shall be distributed annually among the several counties in the ratio of the number of instruction units in each county in each year computed as provided herein. The amount of the first revenues derived from the licensing of motor vehicles to be so set aside in each year and distributed as provided herein shall be an amount equal in the aggregate to the product of four hundred dollars multiplied by the total number of instruction units in all the counties of Florida. The number of instruction units in each county in each year for the purposes of this amendment shall be the greater of (1) the number of instruction units in each county for the school fiscal year 1951- 52 computed in the manner heretofore provided by general law, or (2) the number of instruction units in such county for the school fiscal year computed in the manner heretofore or hereafter provided by general law and approved by the state board of education (hereinafter called the state board), or (3) the number of instruction units in each county on behalf of which the state board of education has issued bonds or motor vehicle tax anticipation certificates under this amendment which will produce sufficient revenues under this amendment to equal one and one-third

times the aggregate amount of principal of and interest on such bonds or motor vehicle tax anticipation certificates which will mature and become due in such year, computed in the manner heretofore or hereafter provided by general law and approved by the state board.

Such funds so distributed shall be administered by the state board as now created and constituted by Section 3 of Article XII [now s. 2, Article IX] of the Constitution of Florida. For the purposes of this amendment, said state board, as now constituted, shall continue as a body corporate during the life of this amendment and shall have all the powers provided in this amendment in addition to all other constitutional and statutory powers related to the purposes of this amendment heretofore or hereafter conferred upon said board.

(b) The state board shall, in addition to its other constitutional and statutory powers, have the management, control and supervision of the proceeds of the first part of the revenues derived from the licensing of motor vehicles provided for in subsection (a). The state board shall also have power, for the purpose of obtaining funds for the use of any county board of public instruction in acquiring, building, constructing, altering, improving, enlarging, furnishing, or equipping capital outlay projects for school purposes, to issue bonds or motor vehicle tax anticipation certificates, and also to issue such bonds or motor vehicle tax anticipation certificates to pay, fund or refund any bonds or motor vehicle tax anticipation certificates theretofore issued by said state board. All such bonds shall bear interest at not exceeding four and one-half per centum per annum and shall mature serially in annual installments commencing not more than three years from the date of issuance thereof and ending not later than thirty years from the date of issuance or January 1, 2000, A.D., whichever is earlier. All such motor vehicle tax anticipation certificates shall bear interest at not exceeding four and one-half per centum per annum and shall mature prior to January 1, 2000, A.D. The state board shall have power to determine all other details of said bonds or motor vehicle tax anticipation certificates and to sell at public sale after public advertisement, or exchange said bonds or motor vehicle tax anticipation certificates, upon such terms and conditions as the state board shall provide.

The state board shall also have power to pledge for the payment of the principal of and interest on such bonds or motor vehicle tax anticipation certificates, including refunding bonds or refunding motor vehicle tax anticipation certificates, all or any part from the anticipated revenues to be derived from the licensing of motor vehicles provided for in this amendment and to enter into any covenants and other agreements with the holders of such bonds or motor vehicle tax anticipation certificates at the time of the issuance thereof concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

No such bonds or motor vehicle tax anticipation certificates shall ever be issued by the state board until after the adoption of a resolution requesting the issuance thereof by the county board of public instruction of the county on behalf of which such obligations are to be issued. The state board of education shall limit the amount of such bonds or motor vehicle tax anticipation certificates which can be issued on behalf of any county to seventy-five per cent of the amount which it determines can be serviced by the revenue accruing to the county under the provisions of this amendment, and such determination shall be conclusive. All such bonds or motor vehicle tax anticipation certificates shall be issued in the name of the state board of education but shall be issued for and on behalf of the county board of public instruction requesting the issuance thereof, and no election or approval of qualified electors or freeholders shall be required for the issuance thereof.

(c) The State Board shall in each year use the funds distributable pursuant to this Amendment to the credit of each county only in the following manner and order of priority:

(1) To pay all amounts of principal and interest maturing in such year on any bonds or motor vehicle tax anticipation certificates issued under the authority hereof, including refunding bonds or motor vehicle tax anticipation certificates, issued on behalf of the Board of Public Instruction of such county; subject, however, to any covenants or agreements made by the State Board concerning the rights between holders of different issues of such bonds or motor vehicle tax anticipation certificates, as herein authorized.

(2) To establish and maintain a sinking fund or funds to meet future requirements for debt service, or reserves therefor, on bonds or motor vehicle tax anticipation certificates issued on behalf of the Board of Public Instruction of such county, under the authority hereof, whenever the State Board shall deem

it necessary or advisable, and in such amounts and under such terms and conditions as the State Board shall in its discretion determine.

(3) To distribute annually to the several Boards of Public Instruction of the counties for use in payment of debt service on bonds heretofore or hereafter issued by any such Board where the proceeds of the bonds were used, or are to be used, in the construction, acquisition, improvement, enlargement, furnishing, or equipping of capital outlay projects in such county, and which capital outlay projects have been approved by the Board of Public Instruction of the county, pursuant to a survey or surveys conducted subsequent to July 1, 1947 in the county, under regulations prescribed by the State Board to determine the capital outlay needs of the county.

The State Board shall have power at the time of issuance of any bonds by any Board of Public Instruction to covenant and agree with such Board as to the rank and priority of payments to be made for different issues of bonds under this Subsection (3), and may further agree that any amounts to be distributed under this Subsection (3) may be pledged for the debt service on bonds issued by any Board of Public Instruction and for the rank and priority of such pledge. Any such covenants or agreements of the State Board may be enforced by any holders of such bonds in any court of competent jurisdiction.

(4) To distribute annually to the several Boards of Public Instruction of the counties for the payment of the cost of the construction, acquisition, improvement, enlargement, furnishing, or equipping of capital outlay projects for school purposes in such county as shall be requested by resolution of the County Board of Public Instruction of such county.

(5) When all major capital outlay needs of a county have been met as determined by the State Board, on the basis of a survey made pursuant to regulations of the State Board and approved by the State Board, all such funds remaining shall be distributed annually and used for such school purposes in such county as the Board of Public Instruction of the county shall determine, or as may be provided by general law.

(d) Capital outlay projects of a county shall be eligible to participate in the funds accruing under this Amendment and derived from the proceeds of bonds and motor vehicle tax anticipation certificates and from the motor vehicle license taxes, only in the order of priority of needs, as shown by a survey or surveys conducted in the county under regulations prescribed by the State Board, to determine the capital outlay needs of the county and approved by the State Board; provided, that the priority of such projects may be changed from time to time upon the request of the Board of Public Instruction of the county and with the approval of the State Board; and provided further, that this Subsection (d) shall not in any manner affect any covenant, agreement, or pledge made by the State Board in the issuance by said State Board of any bonds or motor vehicle tax anticipation certificates, or in connection with the issuance of any bonds of any Board of Public Instruction of any county.

(e) The State Board may invest any sinking fund or funds created pursuant to this Amendment in direct obligations of the United States of America or in the bonds or motor vehicle tax anticipation certificates, matured or to mature, issued by the State Board on behalf of the Board of Public Instruction of any county.

(f) The State Board shall have power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this Amendment of full force and operating effect from and after January 1, 1953. The Legislature shall not reduce the levies of said motor vehicle license taxes during the life of this Amendment to any degree which will fail to provide the full amount necessary to comply with the provisions of this Amendment and pay the necessary expenses of administering the laws relating to the licensing of motor vehicles, and shall not enact any law having the effect of withdrawing the proceeds of such motor vehicle license taxes from the operation of this Amendment and shall not enact any law impairing or materially altering the rights of the holders of any bonds or motor vehicle tax anticipation certificates issued pursuant to this Amendment or impairing or altering any covenant or agreement of the State Board, as provided in such bonds or motor vehicle tax anticipation certificates.

The State Board shall have power to appoint such persons and fix their compensation for the administration of the provisions of this Amendment as it shall deem necessary, and the expenses of the State Board in administering the provisions of this Amendment shall be prorated among the various counties and paid out of the proceeds of the bonds or motor vehicle tax anticipation certificates or from the funds distributable to each county on the same basis as such motor vehicle license taxes are distrib-



utable to the various counties under the provisions of this Amendment. Interest or profit on sinking fund investments shall accrue to the counties in proportion to their respective equities in the sinking fund or funds.

**History.**—Added, S.J.R. 106, 1951; adopted 1952; (a), (b) Am. S.J.R. 218, 1963; adopted 1964.

**<sup>1</sup>SECTION 10. Preservation of existing government.**— All provisions of Articles I through IV, VII and IX through XX of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes.

<sup>1</sup>**Note.**—See table in this volume tracing various provisions of the Constitution of 1885, as amended, into the Florida Statutes.

**SECTION 11. Deletion of obsolete schedule items.**—The legislature shall have power, by joint resolution, to delete from this revision any section of this Article XII, including this section, when all events to which the section to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this section shall be subject to judicial review.

**SECTION 12. Senators.**—The requirements of staggered terms of senators in Section 15(a), of Article III of this revision shall apply only to senators elected in November, 1972, and thereafter.

**SECTION 13. Legislative apportionment.**—The requirements of legislative apportionment in Section 16 of Article III of this revision shall apply only to the apportionment of the legislature following the decennial census of 1970, and thereafter.

**SECTION 14. Representatives; terms.**—The legislature at its first regular session following the ratification of this revision, by joint resolution, shall propose to the electors of the state for ratification or rejection in the general election of 1970 an amendment to Article III, Section 15(b), of the constitution providing staggered terms of four years for members of the house of representatives.

**SECTION 15. Special district taxes.**—Ad valorem taxing power vested by law in special districts existing when this revision becomes effective shall not be abrogated by Section 9(b) of Article VII herein, but such powers, except to the extent necessary to pay outstanding debts, may be restricted or withdrawn by law.

**SECTION 16. Reorganization.**—The requirement of Section 6, Article IV of this revision shall not apply until July 1, 1969.

**SECTION 17. Conflicting provisions.**—This schedule is designed to effect the orderly transition of government from the Constitution of 1885, as amended, to this revision and shall control in all cases of conflict with any part of Article I through IV, VII, and IX through XI herein.

**SECTION 18. Bonds for housing and related facilities.**—Section 16 of Article VII, providing for bonds for housing and related facilities, shall take effect upon approval by the electors.

**History.**—Added, S.J.R. 6-E, 1980; adopted 1980.

**SECTION 19. Renewable energy source property.**—The amendment to Section 3 of Article VII, relating to an exemption for a renewable energy source device and real property on which such device is installed, if adopted at the special election in October 1980, shall take effect January 1, 1981.

**History.**—Added, S.J.R. 15-E, 1980; adopted 1980.

**Note.**—This section, originally designated section 18 by S.J.R. 15-E, 1980, was redesignated section 19 by the editors in order to avoid confusion with section 18 as contained in S.J.R. 6-E, 1980.

**SECTION 20. Access to public records.**—Section 24 of Article I, relating to access to public records, shall take effect July 1, 1993.

**History.**—Added, C.S. for C.S. for H.J.R.'s 1727, 863, 2035, 1992; adopted 1992.